Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

CHARLES H. BEEMAN, *et al.*,

Petitioners,

v.

DEAN COHEN,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a community college's standardized sexual harassment policy, adopted in accordance with a mandate from the State Legislature, that defines a sexually hostile environment in conformity with federal and state laws and administrative guidelines, including those of the Equal Employment Opportunity Commission, is unconstitutionally vague.

2. Whether a publicly funded community college can discipline a professor whose repeated use of sexual language and sexually related topics of discussion in the classroom offends students and obstructs their ability to obtain educational benefit from the instruction.

3. Whether the appeals court erred by failing to consider the dictates of *Waters v. Churchill*, ___ U.S. ___, 114 S. Ct. 1878 (1994), and, thus, failed to appropriately weigh a public employer's ability to discipline employees.

PARTIES TO THE PROCEEDINGS BELOW

Dean Cohen, respondent herein, filed the action.

Petitioners, Charles H. Beeman, Lois J. Carson, Allen B. Gresham, Horace D. Jackson, Carlton W. Lockwood, Jr., Judith Valles, Eugene H. Wood, Stuart Bundy, Donald Singer, Gloria Harrison, Robert Rippy, Antonio Duarte, Carolyn Lindsey, Sylvia Sherman, Juan Zepeda, George Fleming and John C. Molina[1] were individually named as defendants below. San Bernardino Valley College, the Board of Trustees of San Bernardino Community College District and the Faculty Grievance Committee of San Bernardino Valley College, also named as defendants below, were dismissed from the action by the district court by a judgment rendered on the pleadings.

Dean Cohen appealed the judgment of the district court to the court of appeals. Only issues concerning the individual defendants were raised before the court of appeals.

The individuals alone petition this Honorable Court.

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[1] Petitioners are officials of the San Bernardino Community College District (of California), including the Chancellor of the District, the President of one of its colleges, department heads and members of a grievance committee and of the Board of Trustees.

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TO THE HONORABLE WILLIAM H. REHNQUIST, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Charles H. Beeman, Lois J. Carson, Allen B. Gresham, Horace D. Jackson, Carlton W. Lockwood, Jr., Judith Valles, Eugene H. Wood, Stuart Bundy, Donald Singer, Gloria Harrison, Robert Rippy, Antonio Duarte, Carolyn Lindsey, Sylvia Sherman, Juan Zepeda, George Fleming and John C. Molina respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals which is the subject of this petition (App. A, *infra*) was filed on August 19, 1996, and is reported at 92 F.3d 968 (9th Cir. 1996).

The opinion of the district court was entered on April 14, 1995 (App. B, *infra*) and is reported at 883 F. Supp. 1409 (C.D. Cal. 1995). A separate order ruling on Respondent's due process claims, filed concurrently with the opinion (App. C, *infra*), and the judgment of the district court (App. E, *infra*), filed on May 26, 1995, are not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on August 19, 1996. (App. A, *infra*) The Court of Appeals denied a timely petition

for rehearing and en banc review on October 24, 1996. (App. K, *infra*)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED[2]

I. Federal Statutes

The underlying action was based upon the Civil Rights Act of 1871, as amended 42 U.S.C. § 1983 (1981), though interpretation of that statute is not in question. Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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[2] As seen below, the court of appeals opinion implicates other regulations that are adversely affected by analogy. These regulation, however, are not directly involved in this action, and therefore, are not set out in this section.

II. Federal Regulations

Guidelines propounded by the Equal Employment Opportunity Commission ("EEOC"), having the same effect as statute, that define sexual harassment are brought into question by the appellate decision. Title 29 C.F.R section 1604.11 (1995) states:

> (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or a condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
>
> (b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.
>
> (c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents

and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions,

informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

III. State Statutes

The underlying action also involved the California State Constitution, Article I section 2(a), although interpretation of that statute is not in question. Article I section 2(a) states:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

California Education Code section 212.5, is also involved in this action. Section 212.5 states:

> For purposes of this chapter, "sexual harassment" means unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions:

a) Submission to the conduct is explicitly or implicitly made a term or a condition of an individual's employment, academic status, or progress.

b) Submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual.

c) The conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.

d) Submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.

STATEMENT UNDER RULE 29.4(c)

Since the proceeding draws into question the constitutionality of California Education Code section 212.5, a statute enacted by the California Legislature, and neither the State of California nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(b) may be applicable.

No court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(b), certified to the State Attorney General the fact that the constitutionality of such statute has been drawn in question.

STATEMENT OF THE CASE

Respondent Dean Cohen ("Cohen"), a tenured professor, was disciplined by his employer, the San Bernardino Community College District ("District") for violating its sexual harassment policy. The District found that Cohen was guilty of verbal harassment, including the use of profanity and offensive materials in the classroom, that his conduct created a hostile educational environment and that submission to or rejection of the conduct was used as a basis for academic success or failure. (App. M, *infra*, M-2-3) Alleging that his First and Fourteenth Amendment rights were violated by the discipline, Cohen filed suit in the United States District Court for the Central District of California. Cohen asserted that his right to freedom of speech prevented the District from disciplining him for classroom speech. Cohen also alleged that his due process rights were violated by the District.

The District's policy against sexual harassment is a standard policy that mirrors federal and state laws and regulations and prohibits, among other things, conduct that "has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment." (App. O, *infra*, O-2) This case questions whether the District can discipline its employees for conduct prohibited under the sexual harassment policy.

I. Administrative Proceedings Under the Policy.

In May of 1993, a student in Cohen's remedial English class filed a grievance against him alleging that the repeated focus of class discussions and assignments

on topics of a sexual nature, the use of sexual slang, vulgarities, and profanity in the classroom and comments she believed were directed towards her and other females in a humiliating and derogatory manner were offensive and violative of the District's sexual harassment policy.

In accordance with the policies of the District (App. O, P, Q, *infra*), a hearing on the allegations was held before the Grievance Committee. In May of 1993, the Grievance Committee found that Cohen had violated the policy by creating a sexually hostile classroom environment which impeded student learning and made recommendations to the President of the San Bernardino Valley College (the "College"), Petitioner Donald L. Singer ("Singer"), based upon its findings. (App. N, *infra*) Singer upheld the finding of sexual harassment and required that Cohen comply with specific directives.

Both Cohen and the student appealed the Grievance Committee's determination and in October and November of 1993, the Board of Trustees of the District held hearings on the consolidated appeals. Both Cohen and the student were represented at the hearing by counsel and witnesses were called to testify on behalf of both parties.

On November 17, 1993, the Board of Trustees upheld the findings of the Grievance Committee and found that Cohen's classroom conduct impeded student learning and created a sexually hostile educational environment in violation of the District's sexual harassment policy. (App. M, *infra*) The Board of Trustees ordered Cohen to: (a) provide a written syllabus to all of his students at the beginning of classes which would include information regarding teaching style, purpose and content of each

course; (b) attend a sexual harassment training seminar; and (c) be sensitive to the needs of his students and modify his teaching techniques accordingly. Additionally, Cohen was placed on a formal evaluation schedule and a copy of the Board of Trustee's decision was placed in his personnel file. (App. M, *infra*, M-5)

II. The Lower Court Proceedings.

On February 18, 1994, Cohen filed a complaint in the United States District Court, Central District of California challenging the District's ability to discipline him under its sexual harassment policy for classroom speech and conduct. Cohen's request for a preliminary injunction was denied by the District Court on April 21, 1994. (App. F, *infra*)

Cohen appealed the denial of the preliminary injunction to the Ninth Circuit Court of Appeals. He thereafter filed an emergency motion for an injunction pending the appeal and a request for an expedited appeal. The emergency motion and request for expedited appeal were denied by the Ninth Circuit on May 11, 1994. (App. G, *infra*) By stipulation of counsel, Cohen dismissed the appeal of the denial of the preliminary injunction on June 21, 1994. (App. H, *infra*)

On July 22, 1994, the district court granted the motion of Defendants Board of Trustees, the College and the Grievance Committee for judgment on the pleadings and they were dismissed from the action on the grounds that they were not "persons" under 42 U.S.C. section 1983. (App. I, *infra*) Although they continued to be named as parties in the subsequent appeal to the Ninth Circuit,

Cohen did not raise any issues in that court challenging the July 22, 1994, dismissal order.

On November 2, 1994, in response to a motion for summary judgment, the district court granted the remaining defendants, as sued in their individual capacities, qualified immunity from damages. By the same order, the court made factual and legal findings against Cohen relating to his due process claim and dismissed that claim in its entirety. (App. J, *infra*)

Following the district court's grant of the motion for summary judgment, the only issue remaining to be adjudicated was whether Cohen was entitled to injunctive relief against the individual defendants. On January 24, 1995, that issue was submitted to the district court, sitting without a jury, upon a stipulated record and, pursuant to Federal Rule of Civil Procedure 65(a)(2), the evidence received by the trial court on Cohen's applicaiton for a preliminary injunction. The district court issued its opinion in favor of the defendants on April 14, 1995. (App. B, *infra*)

In its opinion the district court found that the District's policy, and its application to Cohen's classroom conduct, did not violate the First Amendment (App. B, *infra*, B-7-14; B-21-29); that Cohen's use of profanity and vulgarity was not a matter of public concern entitled to First Amendment protection (App. B, *infra*, B-17-21); that the District as a public employer was permitted to discipline Cohen for speech and conduct that conflicted with the prohibition of sexual harassment (App. B, *infra*, B-14-17); and that the District's sexual harassment policy was not void for vagueness (App. B, *infra*, B-30-32). In a separate order filed the same day, the district court issued its final ruling on Cohen's due process claim and found it to be meritless. (App. C, *infra*) A Judgment for

Defendants was filed by the district court on May 26, 1995. (App. E, *infra*)

Cohen appealed the decision of the district court to the Ninth Circuit Court of Appeals on June 22, 1995. On August 19, 1996, the Ninth Circuit filed its opinion affirming in part and reversing in part the district court's opinion. (App. A, *infra*) The appeals court confirmed that the dismissal of the Board of Trustees, the College and the Grievance Committee was not disputed by Cohen in the Ninth Circuit. (App. A, *infra*, A-5) The appeals court also affirmed that portion of the district court's opinion granting the individual defendants immunity from damages. (App. A, *infra*, A-12-13) The appeals court held, however, that the policy in question was constitutionally vague and reversed the judgment of the district court on that issue. (App. A, *infra*, A-9-12) The appeals court, thus, remanded the matter to the district court to enjoin the individual defendants from implementing any remaining discipline against Cohen and requiring them to remove any reference to the disciplinary action from his personnel file. (App. A, *infra*, A-13)

Petitioners herein timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc Review on September 10, 1996. On October 23, 1996, the Ninth Circuit entered an order denying leave of amici curiae to file briefs in support of the petition for rehearing. (App. L, *infra*) The petition for rehearing was subsequently denied on October 24, 1996. (App. K, *infra*)

EXISTENCE OF JURISDICTION BELOW

The district court had jurisdiction over the federal civil rights claims under 28 U.S.C. §§ 1331, 1343(a)(3), and 1367.

The court of appeals had jurisdiction of the appeal under 28 U.S.C. § 1291 and Fed. R. App. P. 3.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS OPINION IMPLICATES ISSUES OF SIGNIFICANT CONSTITUTIONAL IMPORTANCE THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The sexual harassment policy invalidated by the Ninth Circuit mirrors federal and state laws and regulations and is virtually identical to standardized policies in use by the public sector and private industry nationwide, primarily in the employment context. The court's opinion rejects the policy without providing any guidance for employers and others who face potential liabilities from victims for failing to have an adequate sexual harassment policy *and* from harassers for enforcing a constitutionally infirm policy. The published opinion leaves wary employees and students, who often take personal risks in reporting harassing conduct, without deserved protections. In this case, the constitutional protection of the right to be free from sexual harassment, the concurrent obligation of an employer or other entity to enforce a policy prohibiting sexual harassment, and the right to freedom of speech collide in a way never before addressed by a federal court of appeals. The issue is in urgent need of this Court's guidance.

Opinions of this Court, while acknowledging that hostile environment sexual harassment does not lend itself to a precise definition, have provided the framework for drafting and enforcing policies prohibiting

environmental harassment. The application of that framework is most evident in EEOC and similar state agency guidelines. Nonetheless, the Ninth Circuit opinion in this case fails to consider in any meaningful way or apply the framework contained in this Court's opinions. This failure results in the invalidation of a sexual harassment policy that comports with federal and state statutory and case law and agency regulations and creates havoc for public and private employers and others.

A. The Sexual Harassment Policy At Issue Mirrors State and Federal Statutes, Court Decisions And Agency Regulations.

1. Supreme Court Decisions.

The appeals court held that the definition of hostile environment sexual harassment in the District's policy was unconstitutionally vague. (App. A, *infra*, A-11) This Court has acknowledged the difficulty of defining hostile environment sexual harassment and, has endorsed the use of both an objective and subjective standard in the definition.[3] Thus, the Court has upheld the right of victims to maintain causes of action for sexual harassment "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive. . . . " *Harris v. Forklift Systems, Inc.*, ___ U.S. ___, 114 S. Ct. 367, 371 (1993). *See also Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405 (1986).

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[3] The challenge of determining whether conduct or speech is entitled to constitutional protection is not new. *See, e.g., Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304 (1957).

Further, this Court has held that

> [w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.

Harris, supra, 114 S. Ct. at 370 (internal citations and quotation marks omitted.) Finally, in recognition of the fact that "hostile environment" cannot be specifically defined, this Court has stated, that whether an environment is hostile "is not, and by its nature cannot be, a mathematically precise test," but "can be determined only by looking at all the circumstances." *Harris, supra,* 114 S. Ct. at 371. These concepts are embodied in the District's policy.

2. Equal Employment Opportunity Commission Guidelines.

Guidelines propounded by the EEOC[4] in conjunction with its responsibilities as the enforcement agency of the provisions of Title VII define sexual harassment in terms remarkably similar to those in the District's policy which the Ninth Circuit declared unconstitutionally vague. Indeed, the only substantive difference is that the EEOC guidelines relate to harassment of an employee and the District policy relates to harassment of a student. The EEOC guidelines define sexual harassment as

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[4] The full text of the EEOC guideline, 29 C.F.R. § 1604.11 (1995) is set forth above.

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or a condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R § 1604.11 The EEOC guidelines, consistent with this Court's opinion in *Harris, supra,* further specifically provide that

> In determining whether the alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the *totality of the circumstances.* . . . The determination of the legality of a particular action will be made from the facts, *on a case by case basis.*

Id. (emphasis added).

3. California State Statutes.

California Education Code sections 200 *et seq.*, mandate that all public and private educational institutions adopt policies proscribing sexual harassment. Section 212.5 defines sexual harassment, in part,[5] as:

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[5] Section 212.5 is set forth in its entirety above.

> unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature . . . under any of the following conditions:
>
> a) Submission to the conduct is explicitly or implicitly made a term or a condition of an individual's . . . academic status, or progress.
>
> b) Submission to, or rejection of, the conduct by the individual is used as the basis of . . . academic decisions affecting the individual.
>
> c) The conduct has the purpose or effect of having a negative impact upon the individual's . . . academic performance or of creating an intimidating, hostile, or offensive . . . educational environment.

The District's policy includes an almost verbatim recitation of Education Code section 212.5, but is *even more expansive* in providing specific examples of conduct that could constitute sexual harassment.

4. California Fair Employment and Housing Commission Guidelines.

As with the EEOC guidelines, guidelines propounded by the California Fair Employment and Housing Commission ("FEHC") proscribe conduct that "includes verbal, physical, and visual harassment, as well as unwanted sexual advances." The regulations further define sexual harassment to include

> (A) Verbal harassment, *e.g.*, epithets, derogatory comments or slurs . . .

* * *

> (C) Visual forms of harassment, *e.g.*, derogatory posters, cartoons, or drawings . . .

Cal. Code of Regs., tit. 2, § 7287.6(b). The essence of FEHC guidelines are incorporated into the District's policy.

5. The Community College District's Policy.

The District's policy, found to be void for vagueness by the court of appeals, employs the *very same principles* and definitions that this and other courts, the EEOC, the FEHC and the California Legislature have used, and are using, to define sexual harassment. The District's policy begins by emphasizing that the District "will provide to all students a learning environment free from sexual harassment, and will not tolerate such conduct on the part of any employee." (App. O, *infra*, O-1)

The policy defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal, written, or physical conduct of a sexual nature" where "[s]ubmission to such conduct is made explicitly or implicitly a term or condition of a student's academic standing or status." It also provides that a violation of the policy occurs when "[s]uch conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment" or "[s]ubmission to or rejection of such conduct is used as the basis for academic success or failure." *Id.* at para. B.

Although totally ignored by the court of appeals, Section C of the policy further defines sexual harassment to specifically include:

1. Verbal harassment – Derogatory comments, jokes or slurs;
2. Physical harassment – Unnecessary or offensive touching, or impeding or blocking movement;
3. Visual harassment – Derogatory or offensive posters, cards, cartoons, graffiti, drawings, or gestures; and
4 Sexual favors – Unwelcome sexual advances, requests for sexual favors and other verbal, written, or physical conduct of a sexual nature upon which is conditioned any educational/academic benefit, or conduct which unreasonably interferes with a student's academic performance or creates an offensive learning environment.

Id. at ¶ C. The sexual harassment policy of the District is, thus, consistent with state and federal statutes, administrative agency guidelines and court opinions, including those of this Court.

Cohen was found to have violated the District's sexual harassment policy by "unreasonably interfering with an individual's academic performance or creating an intimidating, hostile or offensive learning environment. . . . " and that "[s]ubmission to or rejection of such conduct [was] used as the basis for academic success or failure." The Board of Trustees also specifically found that Cohen's classroom speech contained "[d]erogatory comments, jokes or slurs" which are explicitly prohibited by the District's policy. (App. M, *infra*, M-3) The Board of

Trustees further found that Cohen "was on notice, or should have been on notice, that his teaching method was impeding [the student] and other students in their educational process . . . " (App. M, *infra*, M-3)

The unmistakable implication of the court of appeals' opinion is that, in order to pass constitutional muster, a sexual harassment policy *must* list *every* specific word or action that could constitute a violation of the sexual harassment policy. Such a requirement is unwarranted and particularly unreasonable given this Court's pronouncement that each case must be individually evaluated with consideration given to the totality of the circumstances. There is no authority for the impossible standard imposed by the appeals court in this case. "We do not hold that a school must expressly prohibit every imaginable inappropriate conduct by teachers." *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993). *See also Roth v. United States, supra*, 354 U.S. at 491, 77 S. Ct. at 1312 (in attempting to define obscenity, the Court noted, "the Constitution does not require impossible standards.") (citing *United States v. Petrillo*, 332 U.S. 1, 7, 67 S. Ct. 1538, 1542 (1947)); *In Re Kelly*, 841 F.2d 908, 916 (9th Cir. 1988) ("The Constitution does not require the legislature to incorporate *Webster's* into each statute in order to insulate it from vagueness challenges."). It is difficult to envision, and would be impossible to construct, a policy that would encompass every possible act that *could* constitute hostile environment sexual harassment.

B. The Court of Appeals Opinion Has Far-Reaching Implications For Public And Private Employers.

The court of appeals' opinion in this case addresses issues of exceptional constitutional importance. While the decision unmistakably calls into question the constitutionality of federal, state and local governmental regulations and of sexual harassment policies adopted by public employers across the nation, it has a far-reaching impact upon private employers as well.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII") and the California Fair Employment and Housing Act, Government Code Sections 12940, *et seq.* ("FEHA") apply equally to public and private employers and both prohibit sex discrimination, including sexual harassment, in the workplace. The appellate opinion, despite its underlying context, will have vast application to employment cases, including those involving sexual harassment.

First Amendment considerations, including vagueness, will likely be applied in analyzing the enforceability of sexual harassment policies in private industry, as well as to public employers. See *e.g., Hishon v. King & Spalding*, 467 U.S. 69, 104 S. Ct. 2229 (1984) (although a defense based upon the First Amendment was dismissed, the Court accepted without discussion that a First Amendment analysis was applicable to the case). Thus, employees in private industry, like those in the public sector, will be empowered by the court of appeals opinion to contest the enforceability of sexual harassment policies, even when those policies comply with state and

federal guidelines, by claiming that they are unconstitutionally vague.

In fact, First Amendment challenges to private employers' attempts to implement, or to avoid, sexual harassment policies have been considered by the courts. In *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D.Fla. 1991), the court determined that the First Amendment *did not impede* the ability to require an employer to provide a harassment-free environment. The *Robinson* court listed seven reasons why the First Amendment was not violated by enjoining sexually harassing conduct, including that speech which creates a sexually hostile environment is discriminatory conduct not protected by the First Amendment, the regulation is a time, place and manner regulation of speech, female workers are a captive audience to the discriminating conduct, and the balance of interests weighs heavily in the favor of regulating the offending conduct. The court of appeals opinion in this case would obtain the opposite result and would allow a co-worker to avoid the enforcement of a sexual harassment policy by asserting that the policy was not "precise" enough to specifically prohibit the offending conduct.

The court of appeals opinion here would likely impact private industry in yet another way. The FEHA requires that every employer distribute to its employees an information sheet which includes "[t]he definition of sexual harassment under applicable state and federal law." Cal. Gov't Code § 12950(b)(2). That definition, at least as it relates to hostile environment sexual harassment, is, as a result of the opinion in this case, elusive.

Also, employers may be able to escape or reduce liability for sexually harassing conduct by maintaining a well-defined anti-sexual harassment policy. Recent cases support the view that having such a policy and/or an effective grievance procedure can immunize an employer from liability under Title VII for a hostile work environment created by a supervisor. *Gary v. Long*, 59 F.3d 1391, 1398 (D.C.Cir. 1995), *cert. denied sub nom. Gary v. Washington Metro. Area Transit Auth.*, 116 S. Ct. 569 (1995); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 107-08 (3rd Cir. 1994).

Currently, under California state law, a private employer may avoid liability for sexually harassing conduct if it has taken "all reasonable steps necessary to prevent discrimination and harassment from occurring." Cal. Gov't Code § 12940(i). One "reasonable step" considered under subsection (i) is the adoption of a comprehensive sexual harassment policy.

Certainly a policy that incorporates the language of EEOC and FEHC guidelines and follows federal and state statutes would be considered to be a well-defined policy that could shield an employer from liability. Not so, according to the appellate court's opinion in this case, where just such a policy was found to be inadequate, thus potentially subjecting the District to liability.

The opinion in this case has the potential to invalidate sexual harassment policies in the private, as well as the public, sector and expose employers of all kinds to significant liabilities.

C. The Court Of Appeals Opinion Is Not Limited To The Application Of The District Policy To Cohen.

The court of appeals attempted to disguise the broad application of its opinion and avoid scrutiny by stating that the sexual harassment policy was "too vague *as applied to Cohen . . .* " (App. A, *infra*, A-11). However, the impact of the court's opinion is not at all so limited. Instead, its shock-waves are being felt by public employers nationwide. Indeed, the court of appeals repudiated its own attempted limitation of its opinion by leaving open the question of whether the District could have punished Cohen's speech "if the policy were more precisely construed by authoritative interpretive guidelines or if the College were to adopt a *clearer and more precise policy.*" (App. A, *infra*, A-11 , emphasis added.) Thus, it is the *language* of the District policy that was found by the Court to be constitutionally infirm, and *not merely its application to Cohen.*

Indeed, there are no facts in this case to suggest that the District policy would have been applied any differently to any other District employee. Although the opinion criticizes the District for applying its policy to Cohen "on an entirely ad hoc basis" (App. A, *infra*), implying that they chose to "go after" Cohen, the undisputed fact is that the District's actions were prompted by a formal grievance filed by one of Cohen's students. These facts clearly belie that the opinion could validly be limited to the facts of the case as the court of appeals suggests.

The appellate court's opinion calls into question the past and present ability of public employers to discipline employees for sexually harassing conduct and to limit their exposure to liability. In an environment where students and

employees are left the hapless, and now unprotected, victims of sexually harassing conduct, the court of appeals opinion unwittingly does a great disservice.

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

A. The Court Of Appeals Opinion Is Inconsistent With Case Law Governing The Ability Of A Public Employer To Discipline Employees.

The court of appeals failed entirely to give any deference to the ability of the District as a public employer to discipline an employee. In so doing, the court ignored the case of *Waters v. Churchill*, ___ U.S. ___, 114 S. Ct. 1878 (1994), in which this Court bolstered the ability of public employers to discipline employees for speech related conduct by concluding that the public employer's interest in maintaining efficient delivery of services should be given more weight in the balancing process. In remanding the matter to the court of appeals, this Court expressed its view that:

> insufficient weight [was given] to the government's interest in efficient employment decision-making . . . [W]here the government is acting as employer, its efficiency concern should, as we discussed above, be assigned a greater value.

114 S. Ct. at 1888. *See also Connick v. Myers*, 461 U.S. 138, 142, 103 S. Ct. 1684 (1982); *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731 (1968); *Phillips v. Adult Probation Dep't*, 491 F.2d 951 (9th Cir. 1974).

The eradication of sex discrimination, of which sexual harassment is one aspect, is not only considered to be

a legitimate interest of the government, but a compelling interest. *Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 1947 (1987); *Robinson v. Jacksonville Shipyards, supra.* Importantly, a public employer is required by state and federal law to take action to end sexual harassment whenever its existence becomes known to the employer. In fact, the failure of an employer to take corrective action to eliminate sexual harassment and to discipline the perpetrator can subject the employer to federal civil rights liability. *See e.g., Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028 (1992); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1187-88 (7th Cir. 1986); *Oona R.-S. v. Santa Rosa City Schools*, 890 F. Supp. 1452 (N.D. Cal. 1995). As a public employer, the District was entitled, indeed compelled, to take disciplinary action against Cohen when sexually harassing conduct violative of state and federal law came to its attention. The court of appeals opinion fails to even consider the public employer's interest in providing services to its students and its ability to discipline employees for failure to comply with the policies of the employer.

B. The Appellate Court Wrongfully Denied The District The Ability to Control The Use of Vulgarities and Obscenities In The Classroom By Cloaking Them With Undeserved Constitutional Protection.

Cohen's classroom speech was of two kinds: (1) the assignment and discussion of a preponderance of sexually related topics and (2) sexual slurs, vulgarities and obscenities. The court of appeals opinion completely failed to address the overwhelming evidence of the prevalence of vulgarities, obscenities and sexual slurs used by

Cohen in his classroom discussions. This aspect of Cohen's speech is *not* a matter of public concern and *is not* entitled to constitutional protection.

In order to claim a deprivation of a First Amendment right, Cohen must first demonstrate that the speech being regulated constitutes a matter of public concern. *Connick v. Myers, supra,* 103 S. Ct. at 1690. The use of vulgarities, obscenities and sexual slang language is *not a matter of public concern* and, therefore, is not protected speech under the First Amendment. *Yniguez v. Arizonans for Official English,* 42 F.3d 1217, 1235 n. 20 (9th Cir. 1994).

Evidence presented to the Board of Trustees demonstrated that vulgar and crude language was used regularly in Cohen's classroom. Even witnesses appearing on behalf of Cohen confirmed that vulgarities and sexual slang language were used in the classroom. Compelling, uncontroverted evidence before the Board of Trustees included that Cohen read, or distributed, to his students articles he wrote in which, among other things, he (1) describes having an erection within 8 seconds of watching a pornographic movie; (2) adopts a pornographic movie rating system known as the "handkerchief test" which assigns a rating to a movie based upon how many handkerchiefs it would take a man "to clean his sperm from the back of the seat directly ahead of him . . . ," (3) refers to his "peter meter" in describing his responses to pornographic movies, (4) opines that celibacy is a form of self-mutilation, and (5) describes the genre of pornographic movies as "filled with repeated images of monster phalluses, gaping vaginas, and the multitude of possibilities inherent in orifice/phallus combinations."

Profanity and obscenity such as that frequently used in Cohen's classes are *not matters of public concern* and are not entitled to constitutional protection. Courts have denied First Amendment protection to profanity even if used at the college and university level. *Martin v. Parrish*, 805 F.2d 583, 585 (5th Cir. 1986) (court rejected the notion that the use of profanity in a college class to "motivate" the students entitled the speech to constitutional protection.); *Dambrot v. Central Michigan Univ.*, 839 F. Supp. 477, 488 (E.D. Mich. 1993) (a university coach's use of a racial epithet was not speech on a matter of public concern).

The above citations read in conjunction with the court of appeals' opinion in this case would obtain the illogical result that a community college district could discipline a professor for the conduct at issue here under general principles, but it could not do so under a sexual harassment policy that comports with state and federal guidelines. The better result is to recognize that vulgarities and obscenity are violative of sexual harassment policies, are not protected speech under the First Amendment and to examine the discipline imposed to insure that it was commensurate with the injury to be avoided. In this case, based upon Cohen's use of vulgarities, obscenities and slurs alone, the District was warranted in taking disciplinary action against Cohen.

C. The District's Discipline Was Narrowly Drawn To Achieve A Proper Balance Between Constitutional Principles.

When constitutional guarantees collide, the competing interests must be balanced and the most restrictive method for resolving the conflict must be adopted. *See*

Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 2305 (1972). The District scrupulously complied with this precept. The Board of Trustees did not restrict Cohen's teaching methods or course content. Instead, the Board of Trustees demonstrated a keen understanding of the competing constitutional protections and remarkable restraint by imposing the least restrictive of conditions upon Cohen. (App. M, *infra*)

An important element of sexual harassment is that the words or conduct are "unwelcome." By requiring that Cohen provide a syllabus to students advising them of the nature and style of the classes he teaches, it is less likely that Cohen's conduct would be interpreted as unwelcome.

The Board of Trustees's order was also reasonably related to legitimate pedagogical objectives; to redress a problem resulting from Cohen's classroom conduct which was so abrasive and harassing that his students no longer had the ability to understand the lessons and, thus, were impeded in their learning process. The District's action was narrowly tailored to redress the specific identified problems, and was a reasonable time, place and manner regulation of Cohen's speech. *See Connick, supra*, 461 U.S. at 152-53; *Cox v. Louisiana*, 379 U.S. 536, 558, 85 S. Ct. 453 (1965); *Phillips v. Adult Probation Dep't, supra*, 491 F.2d at 955.

The District did *not* ban the textbook or materials used by Cohen in his classes, nor order him to cease discussing any topics. *See Virgil v. School Bd.*, 862 F.2d 1517, 1525 (11th Cir. 1989). The District did *not* order Cohen to stop requiring his students to discuss or write about controversial, or even sexually related, topics. The

District did *not* attempt in any way to restrict Cohen's speech or activities outside of the classroom. The District did *not* prohibit, or regulate, Cohen's speech because they disagreed with his views toward pornography, obscenity or any of the other "controversial" topics, but because of the negative impact upon student learning.

Instead, the District merely ordered Cohen to provide a syllabus describing his classes so that students could make an informed decision about enrolling in his classes; take a sexual harassment training seminar; and be sensitive and aware of the particular needs and backgrounds of his students so that his classroom conduct does not impede their ability to learn. (App. M, *infra*) The Board of Trustees's remedy for the sexual harassment complied with constitutional considerations and was reasonably and narrowly related to achieving legitimate ends.

D. The Court Of Appeals Displayed A Fundamental Misunderstanding Of Hostile Environment Sexual Harassment.

The court of appeals failed to appreciate the significant differences between *quid pro quo* and hostile environment sexual harassment. Its misunderstanding is most evident in the wording of the opinion which finds that "Cohen's speech *did not fall within the core region of sexual harassment* as defined by the Policy" and refers to an "ad hoc" application of the "Policy's *nebulous outer reaches.*" (App. A, *infra*, A-11) It is entirely unclear what is referred to as the "core region of sexual harassment," unless it is *quid pro quo* harassment.

That the appellate court ignored the portion of the District's policy that defines verbal and visual harassment is a clear indicator that the court viewed *quid pro quo* sexual harassment alone as the "core region" of sexual harassment. The courts' apparent cavalier relinquishment of hostile environmental sexual harassment to the "nebulous outer reaches" demonstrates a fundamental lack of regard for, or understanding of, this insidious form of sexual harassment. The court of appeals is wrong. Environmental sexual harassment is no less invidious than *quid pro quo* harassment, although it is often more difficult to define and to enforce its prohibition.

The court of appeals improperly would require the District's policy to specifically define the conduct that could constitute environmental sexual harassment. Such a requirement is neither possible nor desired.

For all of the reasons above, the Court of Appeals decision is erroneous.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: January 22, 1997

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEAN COHEN, *Plaintiff-Appellant,* v. SAN BERNARDINO VALLEY COLLEGE; THE BOARD OF TRUSTEES OF SAN BERNARDINO COMMUNITY COLLEGE DISTRICT; CHARLES H. BEEMAN; LOIS J. CARSON; ALLEN B. GRESHAM; HORACE D. JACKSON; CARLTON W. LOCKWOOD, JR.; JUDITH VALLES, et al., *Defendants-Appellees.*	No. 95-55936 D.C. No. CV 94-1083-RSWL OPINION

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted
July 8, 1996 – Pasadena, California

Filed August 19, 1996

Before: Ferdinand F. Fernandez and A. Wallace Tashima,
Circuit Judges, and Robert R. Merhige,
Senior District Judge.*

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* The Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Opinion by Judge Merhige

SUMMARY

Labor and Employment/Sexual Harassment/ Individual Rights

The court of appeals reversed in part and remanded, and affirmed in part, a district court judgment. The court held that a public college's sexual harassment policy was unconstitutionally vague as applied to a professor disciplined for his sexually oriented teaching methods. The court also held that the officials who disciplined the professor were entitled to qualified immunity.

Appellant Dean Cohen was a tenured professor at appellee San Bernardino Valley College. For many years Cohen had assigned provocative essays and discussed subjects such as obscenity, cannibalism, and consensual sex with children in his remedial English class. In one class he read articles from Playboy and Hustler and assigned the class to write an essay defining pornography. Ms. M., a student in the class, was offended by Cohen's profanity and focus on sexual topics and filed a sexual harassment grievance.

The college found that Cohen had violated its recently adopted sexual harassment policy. The college ordered Cohen to provide a class syllabus, attend a sexual harassment seminar, undergo a formal evaluation, and become sensitive to the needs of his students and modify his teaching strategy accordingly.

Cohen filed suit against the college, the board of trustees, the grievance committee, and individual officials

claiming that he was unconstitutionally punished for his classroom speech because the college's sexual harassment policy gave him insufficient notice that his conduct was prohibited.

The district court dismissed the college, the board, and the grievance committee. The court denied Cohen's request for injunctive relief against the individual officials and ruled that the officials were entitled to qualified immunity from his damages claims. Cohen appealed the rulings regarding the individual officials.

[1] Vague policies violate the First Amendment when they (1) trap the innocent by not providing fair warning, (2) impermissibly delegate basic policy matters to low level officials for resolution on a subjective basis, and (3) discourage the exercise of First Amendment freedoms.

[2] Cohen was punished under the sexual harassment policy provision prohibiting conduct which has "the effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile or offensive work environment." He was punished for his confrontational teaching style, assigning provocative essays, using vulgarities, and emphasizing topics of a sexual nature.

[3] The policy was too vague as applied to Cohen. His speech did not fall within the core region of sexual harassment as defined by the policy. Instead, the college applied the policy's outer reaches to punish teaching methods that Cohen had used for many years. Cohen simply did not have notice that the policy would be applied in such a way.

[4] Government officials performing discretionary functions, such as, in this case, disciplining Cohen, are entitled to qualified immunity from civil liability when their conduct does not violate clearly established rights of which a reasonable person would have known. In this case, the legal issues were not readily discernible and it was not clear that the officials should have known their actions violated Cohen's rights.

COUNSEL

Stephen F. Rohde, Rohde & Victoroff, Los Angeles, California, for the plaintiff-appellant.

Susan J. Boyle, Littler, Mendelson, Fastiff, Tichy & Mathiason, San Diego, California, for the defendants-appellees.

OPINION

MERHIGE, Senior District Judge:

The Appellant Dean Cohen is a tenured professor at the San Bernardino Valley College (the "College"), a public community college established by the State of California. This controversy arose when, at the conclusion of grievance procedures initiated against Cohen by a student, the College determined that Cohen had violated its sexual harassment policy (the "Policy") and imposed various disciplinary penalties upon him.

Cohen filed the instant lawsuit on February 18, 1994 in the United States District Court for the Central District of California under 42 U.S.C. § 1983 against the College, the Board of Trustees of the College (the "Board"), the Faculty Grievance Committee of the College (the "Grievance Committee"), and various individual officials of the College for violation of his First and Fourteenth Amendment rights. Cohen asserts that he was punished for his classroom speech under a sexual harassment policy which gave him insufficient notice that his conduct was prohibited and that his rights to free speech, academic freedom, and due process were violated.

The district court dismissed the College, the Board, and the Grievance Committee from the lawsuit on the basis that these parties are immune under the Eleventh Amendment and are not "persons" under § 1983. Cohen does not appeal this aspect of the case.

The district court granted summary judgment as to each of the remaining individual officials with respect to the damages component of each of Cohen's claims based on the determination that the officials are entitled to qualified immunity. The district court also granted summary judgment to the individual officials with respect to the remaining injunctive aspects of Cohen's due process claim on the merits. Finally, after a bench trial based on a stipulated record, the district court entered judgment for the individual officials on the injunctive aspects of Cohen's First Amendment claim. Cohen appeals these rulings.

We conclude, as discussed below, that the Policy was unconstitutionally vague as applied to Cohen and therefore reverse in part the judgment of the district court and remand so that the officials of the College may be enjoined from punishing Cohen, under the Policy. We also conclude that the district court correctly determined that the various individual officials were entitled to qualified immunity from civil liability. Because it is not necessary so to do, we do not address Cohen's due process claim.

I.

Cohen is a tenured professor at the College who has taught English and Film Studies there since 1968.

In the Spring of 1992, Cohen taught a remedial English class which is a prerequisite to other college-level English classes. One student in the class, who we shall refer to as "Ms. M.," became offended by Cohen's repeated focus on topics of a sexual nature, his use of profanity and vulgarities, and by his comments which she believed were directed intentionally at her and other female students in a humiliating and harassing manner. During this class Cohen began a class discussion on the issue of pornography and played the "devil's advocate" by asserting controversial viewpoints. Cohen has for many years typically assigned provocative essays such as Jonathan Swift's "A Modest Proposal" and discussed subjects such as obscenity, cannibalism, and consensual sex with children in a "devil's advocate" style. During classroom discussion on pornography in the remedial English class in the Spring of 1992, Cohen stated in class that he

wrote for Hustler and Playboy magazines and he read some articles out loud in class. Cohen concluded the class discussion by requiring his students to write essays defining pornography. When Cohen assigned the "Define Pornography" paper, Ms. M asked for an alternative assignment but Cohen refused to give her one.

Ms. M stopped attending Cohen's class and received a failing grade for the semester. She subsequently complained about Cohen's statements and conduct to the chair of the English Department, asserting that Cohen had sexually harassed her. Ms. M subsequently filed a formal written student grievance against Cohen.

The College had recently implemented a new sexual harassment Policy and Cohen was apparently the first faculty member to face a grievance based on the Policy. The Policy states that:

> Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal, written, or physical conduct of a sexual nature it includes, but is not limited to, circumstances in which:
>
> 1. Submission to such conduct is made explicitly or implicitly a term or condition of a student's academic standing or status.
>
> 2. Such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment.
>
> 3. Submission to or rejection of such conduct is used as the basis for academic success or failure.

The Grievance Committee held a hearing to determine whether Ms. M's complaint was well-founded. Ms. M's complaint was well-founded. Both Cohen and Ms. M testified, submitted documents, and called witnesses on their own behalf. At the conclusion of the hearing, the Grievance Committee found that Professor Cohen had violated the College's policy against sexual harassment by creating a hostile learning environment. The Grievance Committee then recommended certain disciplinary actions to the President of the District.

The President of the District then issued a ruling which found Cohen in violation of the District's policy against sexual harassment. Among other things, the President found that Cohen engaged in "sexual harassment which had the effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile or offensive work environment."

Both Cohen and Ms. M appealed the President's and Grievance Committee's decision to the Board which considered the matter at hearings in October and November of 1993. Cohen and Ms. M were represented by attorneys and each of them testified on their own behalf. In addition, students came forward to testify about the sexual nature of Cohen's teaching material and his frequent use of derogatory language, sexual innuendo, and profanity.

On November 17, 1993, the Board found that Cohen engaged in sexual harassment which unreasonably interfered with an individual's academic performance and created an intimidating, hostile, or offensive learning environment. The Board then ordered Cohen to:

1. Provide a syllabus concerning his teaching style, purpose, content, and method to his students at the beginning of class and to the department chair by certain deadlines;[1]

2. Attend a sexual harassment seminar within ninety days;

3. Undergo a formal evaluation procedure in accordance with the collective bargaining agreement; and

4. Become sensitive to the particular needs and backgrounds of his students, and to modify his teaching strategy when it becomes apparent that his techniques create a climate which impedes the students' ability to learn.

Cohen was, additionally, advised that further violation of the Policy would result in further discipline "up to and including suspension or termination" and the Board ordered that its decision be placed in Cohen's personnel file.

II.

A. First Amendment

The conclusion of the College was that Cohen had created a "hostile learning environment" by his sexually oriented teaching methods and had, therefore, violated the College's sexual harassment policy. The College took adverse employment action against Cohen based on this conclusion. Cohen asserts that his First Amendment

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[1] No other professor at the College is required to provide such a syllabus.

rights have been violated. Constitutional issues are reviewed *de novo*. *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 55 (9th Cir. 1995).

Neither the Supreme Court nor this Circuit has determined what scope of First Amendment protection is to be given a public college professor's classroom speech. We decline to define today the precise contours of the protection the First Amendment provides the classroom speech of college professors because we conclude that the Policy's terms were unconstitutionally vague as applied to Cohen in this case.

It is fundamental that statutes regulating First Amendment activities must be narrowly drawn to address only the specific evil at hand. *Broadrick v. Oklahoma*, 413 U.S. 601, 611-612 (1973). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). This Court, in a case involving the out-of-class speech of a university professor, stated that "when a statute or regulation by its vagueness or overbreadth threatens to deter the exercise of first amendment freedoms, we require of it greater precision and specificity than would be necessary to fulfill fifth or fourteenth amendment due process requirements." *Adamian v. Jacobsen*, 523 F.2d 929, 932 (9th Cir. 1975).

[1] There are three objections to vague policies in the First Amendment context. First, they trap the innocent by not providing fair warning. Second, they impermissibly delegate basic policy matters to low level officials for resolution on an ad hoc and subjective basis,

with the attendant dangers of arbitrary and discriminatory application. Third, a vague policy discourages the exercise of first amendment freedoms. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). "[W]here the guarantees of the First Amendment are at stake the [Supreme] Court applies its vagueness analysis strictly." *Bullfrog Films Inc. v. Wick*, 847 F.2d 502, 512 (9th Cir. 1988).

[2] In this case, the College punished Cohen based on his teaching methods under the provision of the Policy which prohibits conduct which has the "effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment." Cohen, admittedly, uses a confrontational teaching style designed to shock his students and make them think and write about controversial subjects. He assigns provocative essays such as Jonathan Swift's "A Modest Proposal" and discusses controversial subjects such as obscenity, cannibalism, and consensual sex with children. At times, Cohen uses vulgarities and profanity in the classroom and places substantial emphasis on topics of a sexual nature.

[3] We do not decide whether the College could punish speech of this nature if the Policy were more precisely construed by authoritative interpretive guidelines or if the College were to adopt a clearer and more precise policy. Rather, we hold that the Policy is simply too vague as applied to Cohen in this case. Cohen's speech did not fall within the core region of sexual harassment as defined by the Policy. Instead, officials of the College, on an entirely ad hoc basis, applied the Policy's nebulous outer reaches to punish teaching methods that Cohen had used for many years. Regardless

of what the intentions of the officials of the College may have been, the consequences of their actions can best be described as a legalistic ambush. Cohen was simply without any notice that the Policy would be applied in such a way as to punish his longstanding teaching style – a style which, until the College imposed punishment upon Cohen under the Policy, had apparently been considered pedagogically sound and within the bounds of teaching methodology permitted at the College.

B. Qualified Immunity

"We review de novo a district court's decision on qualified immunity in a section 1983 action." *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996).

[4] The doctrine of qualified immunity shields public officials performing discretionary functions from personal liability under certain circumstances. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As the Supreme Court explained in *Anderson v. Creighton*, 483 U.S. 635 (1987), "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Id.* at 635 (citations omitted) (quoting *Harlow*, 457 U.S. at 818, 819). Thus, government officials performing discretionary functions, such as, in this case, demoting, evaluating and disciplining Cohen, are entitled to qualified immunity from civil liability when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Lindsey v. Shalmy*, 29 F.3d 1382, 1384 (9th Cir. 1994). The

relevant inquiry is whether the defendants reasonably could have believed that their conduct was lawful "in light of clearly established law and the information [that they] possessed." *Baker v. Racansky*, 887 F.2d 183, 187 (9th Cir. 1989) (internal quotations omitted). For a right to be clearly established, it must be " 'sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [I]n the light of pre-existing law the unlawfulness must be apparent.' " *Id.* at 186 (quoting *Anderson*, 483 U.S. at 639-40). It is the plaintiff's burden to prove that the right that the defendants violated was clearly established at the time of the alleged misconduct. *Id.*

The legal issues raised in this case are not readily discernable and the appropriate conclusion to each is not so clear that the officials should have known that their actions violated Cohen's rights.

III.

We **REVERSE IN PART** that aspect of the district court decision which held that the imposition of discipline upon Cohen did not violate the First Amendment and **REMAND** the case so that the district court may enjoin the College officials from further implementing any remaining discipline and requiring that all references to the disciplinary decision be removed from Cohen's personnel file. We **AFFIRM IN PART** that aspect of the district court's judgment which held that the individual officials were qualifiedly immune. Cohen shall recover his costs on appeal.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEAN COHEN, Plaintiff, vs. SAN BERNARDINO VALLEY COLLEGE et al. Defendant	)	CV-94-1083-RSWL-GHKx OPINION (Filed Apr. 14, 1995)

Pursuant to Fed. R. Civ. P. 65(a), the parties in this case have stipulated to a bench trial in this matter based solely on a stipulated record and written briefs. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367.

Plaintiff Dean Cohen ("Cohen") brings a 42 U.S.C. § 1983 action for violation of his First Amendment rights. He asks the Court to grant injunctive relief against various officials of San Bernardino Valley College (Defendants are hereinafter collectively referred to as "the College"). This action presents the question of whether a state college may limit the classroom speech of its professors in order to prevent the creation of a hostile, sexually discriminatory environment for its students. The Court hereby rules that a state college may do so, if the limitations involved are reasonable and narrowly tailored to achieve the college's mission of effectively educating its students. Plaintiff therefore receives no relief in this action.

II. Facts[1]

The following facts are uncontroverted. Cohen is a tenured professor who has taught English and Film Studies at San Bernardino Valley College ("SBVC") since 1968. In the spring of 1992, Cohen taught a remedial English class (English 015) to community college students. Students are required to take English 015 as a prerequisite to other college-level English classes such as English 101. This matter arises out of discipline imposed on Cohen for his teaching in a 015 class in the spring semester of 1992.

By his own admission, Cohen uses a confrontational teaching style designed to shock his students and make them think and write about controversial subjects. He assigns provocative essays such as Jonathan Swift's "A Modest Proposal" and discusses subjects such as obscenity, cannibalism, and consensual sex with children.[2] At times, Cohen uses vulgarities and profanity in the classroom.

One of the students in the spring semester English 015 class, Anita Murillo, became offended by Cohen's repeated focus on topics of a sexual nature, his use of profanity and vulgarities, and by his comments which she believed were directed intentionally at her and some other female students in a humiliating and harassing

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[1] The parties have stipulated that the record consists of evidence previously submitted on Plaintiff's motion for preliminary injunction and Defendants' motion for summary judgment.

[2] It appears that the consensual sex with children topic is not discussed in his English 015 classes.

manner. In February of 1992, Cohen began a class discussion in his English 015 class on the issue of pornography and played the "devil's advocate" by asserting controversial viewpoints. During classroom discussion on this subject, Cohen stated in class that he wrote for Hustler and Playboy, and he read some articles out loud in class.[3] Cohen concluded the class discussion by requiring his students to write essays defining pornography. When Cohen assigned the "Define Pornography" paper, Murillo asked for an alternative assignment but Cohen refused to give her one.

According to Murillo, Professor Cohen then told her that if she met him in a bar he would help her get a better grade. She also claimed that Cohen would look down her shirt, as well as the shirts of other female students, and that he told her she was overreacting because she was a woman.

Murillo stopped attending Cohen's class and received a failing grade for the semester. She subsequently complained about Cohen's statements and conduct to the chair of the English Department, asserting that Cohen had sexually harassed her. Murillo then filed

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[3] The record is unclear as to what articles were read in Murillo's class. Students from other classes testified that Cohen distributed, as mandatory reading on the pornography topic, an article he had written entitled "The Film Critic and Pornography." Ex. 17 at 403, 409. Cohen's article discusses the definition of a "four-handkerchief movie" (i.e., a pornographic film which is extremely arousing to the male viewer) and contains the line "I had an erection in about eight seconds." Ex. 18 at 205. This article was discussed in those classes.

a formal written student grievance against Cohen on May 12, 1993.

On May 26, 1993, the SBVC Faculty Grievance Committee held a hearing to determine whether Murillo's complaint was well-founded. Both Cohen and Murillo testified, submitted documents, and called witnesses on their own behalf. At the conclusion of the hearing, the Grievance Committee found that Professor Cohen had violated the Community College District's policy against sexual harassment by creating a hostile learning environment.[4] The Grievance Committee then recommended certain disciplinary action to the President of the District.

The President of the District then issued a ruling which found Cohen in violation of the District's policy against sexual harassment. Among other things, the President found that Cohen engaged in "sexual harassment which had the effect of unreasonably interfering with an

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[4] The San Bernardino Valley Community College District prohibits sexual harassment by employees. It defines sexual harassment as

> unwelcome sexual advances, requests for sexual favors, and other verbal, written, or physical conduct of a sexual nature. It includes, but is not limited to circumstances in which: . . . (2) Such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment.

SBVC Student Sexual Harassment Plan, Policy 6130.

Under this policy, forms of sexual harassment "include but are not limited to. . . . (v)erbal harassment – [d]erogatory comments, jokes or slurs." *Id.*

individual's academic performance or creating an intimidating, hostile or offensive work environment." In addition, the President found that Cohen made "sexually suggestive" remarks to Murillo and that several students were offended by Professor Cohen's use of profanity and frequent use of sexual topics in class.

Both Cohen and Murillo appealed the President and Grievance Committee's decision to the San Bernardino Community College Board of Trustees ("Board") which considered the matter at hearings on October 15, 1993 and November 11, 1993. Cohen and Murillo were represented by attorneys and each of them testified on their own behalf. In addition, students came forward to testify about the sexual nature of Cohen's teaching material and his frequent use of derogatory language, sexual innuendo, and profanity.

On November 17, 1993, the Board found that Cohen engaged in sexual harassment which unreasonably interfered with an individual's academic performance and created an intimidating, hostile, or offensive learning environment. The Board then ordered Cohen to:

1. Provide a syllabus concerning his teaching style, purpose, content, and method to his students at the beginning of class and to the department chair by certain deadlines;

2. Attend a sexual harassment seminar within ninety days;

3. Undergo a formal evaluation procedure in accordance with the collective bargaining agreement; and

4. Become sensitive to the particular needs and backgrounds of his students, and to modify his teaching strategy when it becomes apparent that his techniques create a climate which impedes the students' ability to learn.

Thereafter, on February 18, 1994, Cohen filed a suit under 42 U.S.C. § 1983 against the San Bernardino Valley College Board of Trustees, the Chancellor of SBVC, the President of SBVC, various SBVC department heads, and members of the Faculty Grievance Committee. The complaint sought a declaratory judgment, a preliminary and permanent injunction, damages, and attorneys' fees. On April 4, 1994, this Court denied Cohen's motion for a preliminary injunction, on the grounds that Cohen failed to show a likelihood of success on the merits. On July 18, 1994 this Court also dismissed entity defendants San Bernardino Valley College, the Board of Trustees of San Bernardino Community College District, and the Faculty Grievance Committee, on the grounds that the entity defendants enjoy Eleventh Amendment immunity and are not considered "persons" under 42 U.S.C. § 1983.[5] On October 31, 1994, the Court ruled that the individual defendants are entitled to qualified immunity from damages under § 1983.

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[5] Defendants argue that this Court cannot grant Cohen's request for injunctive relief because (1) in their individual capacities, none of the remaining Defendants have the power to carry out the requested relief; and (2) in their official capacities, the members of the Grievance Committee do not have the power to carry out the requested relief. Defendants' arguments are not persuasive. *Savarese v. Agriss*, 883 F.2d 1194, 1209 (3d Cir. 1989).

II. The SBVC Policy As Applied to Cohen Does Not Violate the First Amendment

The heart of this suit is Cohen's assertion that the College's sexual harassment policy violates the First Amendment to the United States Constitution and Article I, § 2(a) of the California Constitution.[6] Cohen's position implicates the current debate concerning the need to make workplaces and schools places of inclusion, and the need to preserve individual liberties.[7]

A. Academic Freedom Doctrine

Cohen argues that his right to "academic freedom" prevents the College from punishing him for his classroom speech. In support of his argument, Cohen cites

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[6] Cohen does not separately argue his state law claim but states in his Opening Trial Brief that references to the First Amendment should be taken to include the California Constitution as well.

Art. I., § 2(a) of the California Constitution provides that

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.

The California Constitution more broadly protects the right to expression than does the First Amendment. *Robins v. Pruneyard Shopping Ctr.*, 23 Cal.3d 899, 907, 153 Cal. Rptr. 854, 859 (1979), *aff'd*, 447 U.S. 74, 100 S. Ct. 2035 (1980). However, Cohen cites no cases, and there appear to be no cases under the state constitution which protect Cohen's speech in this context.

[7] *See* Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 U.C.L.A. L. Rev. 1791 (1992); *see, e.g.*, Asra Q. Nomani, *Was Prof's Lecture Academic Freedom Or Sex Harassment?*, Wall St. J., March 7, 1995, at A1.

numerous cases. The concept of academic freedom, however, is more clearly established in academic literature than it is in the courts. *See generally* Symposium, *Academic Freedom in a Changing Society,* 66 Texas L. Rev.1247 (1988). As one commentator has written,

> The First Amendment protects academic freedom. This simple proposition stands explicit or implicit in numerous judicial opinions, often proclaimed in fervid rhetoric. Attempts to understand the scope and foundation of a constitutional guarantee of academic freedom, however, generally result in paradox or confusion. The cases, shorn of panegyrics, are inconclusive, the promise of their rhetoric reproached by the ambiguous realities of academic life.
>
> The problems are fundamental: There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles.

J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 Yale L.J. 251, 252-53 (1989).

Several courts have noted that judicial application of this doctrine is far from clear. *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 552-53 (5th Cir.), *cert. denied*, 457 U.S. 1106, 102 S. Ct. 2906 (1982); *Mahoney v. Hankin*, 593 F. Supp. 1171, 1174 (S.D.N.Y. 1984) (stating that the parameters of academic freedom "are not well-defined, especially with regard to a teacher's speech within the [college] classroom").

While Supreme Court cases contain strongly worded defenses of "academic freedom," their rhetoric is broader than their holdings. Namely, many cases restrict the government from regulating teachers' *non-classroom* conduct. For example, teachers like other government employees cannot be punished or excluded under unconstitutional statutes requiring them to take "loyalty oaths" or otherwise disclose their allegiance to "subversive" groups. *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S. Ct. 1203 (1957); *Wieman v. Updegraff*, 344 U.S. 183, 73 S. Ct. 215 (1952). Nor may teachers be punished under unconstitutionally vague statutes forbidding "treasonable" or "seditious" words or actions. *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S. Ct. 675 (1967). The state is also precluded from punishing a teacher for publicly expressing his views on matters of public concern in regards to education. *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S. Ct. 1731 (1968) (holding unconstitutional a school board's firing of a high school teacher for writing a letter to a local newspaper criticizing the school board); *see* discussion § II B. *infra*.

Most of the appellate cases cited by Cohen deal, like *Pickering*, with non-classroom conduct. *Powell v. Gallentine*, 992 F.2d 1088 (10th Cir. 1993) (holding professor's revelation of grade fraud protected as a matter of public concern); *Levin v. Harleston*, 966 F.2d 85, 88-89 (2d Cir. 1992) (finding that professor could not be penalized for non-classroom, controversial writings); *Greminger v. Seaborne*, 584 F.2d 275, 277 (8th Cir. 1978) (finding that public comment on educational funding and salaries was protected by the First Amendment). Other cited cases do not rest on First Amendment grounds. *See, e.g., Mailloux v.*

Kiley, 448 F.2d 1242, 1243 (1st Cir. 1971) (per curiam) (affirming on Due Process grounds judgment for high school teacher who used an obscenity in English class).

Cohen cites only two Supreme Court cases which deal with regulation of teachers' *classroom* conduct, and these cases are based on the Establishment Clause, not on freedom of expression. *Edwards v. Aguillard*, 482 U.S. 578, 596-97, 107 S. Ct. 2573, 2584 (1987) (striking down state law requiring teachers who taught "evolution-science" to also teach "creation-science," on the grounds that the law endorsed religion in violation of the First Amendment); *Epperson v. Arkansas*, 393 U.S. 97, 103-04, 89 S. Ct. 266, 270 (1968) (striking down state law prohibiting teaching of evolution, on the grounds that the government should be "neutral" in regards to religious tenets).

In further support of his "academic freedom" argument, Cohen cites cases dealing with the constitutional rights of *students* within the school environment. *Healy v. James*, 408 U.S. 169, 187-88, 92 S. Ct. 2338-49 (1972) (upholding associational right of college students forming a SDS chapter to be formally recognized by the university and be accorded the same access to campus facilities as other college clubs); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 505-06, 89 S. Ct. 733, 736 (1969) (upholding freedom to expression right of high school students to wear black armbands to school, in protest of the Vietnam War). Again, these cases do not directly control the facts of this case.

Moreover, recent Supreme Court cases have narrowed the scope previously accorded to students' exercise of their constitutional rights within the high school

setting. In *Hazelwood Sch. Dist. v. Kuhlmeier,* the Court allowed a high school principal to censor the school newspaper, because the censorship "reasonably related to legitimate pedagogical concerns." 484 U.S. 260, 273, 108 S. Ct. 562, 571 (1988). In so ruling, the Supreme Court stated that, while students do not shed their rights at the schoolhouse door, students' freedom of expression is " 'not automatically coextensive with the rights of adults in other settings.' " *Hazelwood,* 484 U.S. at 267, 108 S. Ct. at 567 (quoting *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 682, 106 S. Ct. 3159, 3164 (1986)). This was a restriction of *Tinker,* which primarily focused on whether the expression at issue presented the possibility of materially and substantially disrupting the educational process. *Tinker,* 393 U.S. at 512-13, 89 S. Ct. at 740. The *Hazelwood* Court stressed that high schools are allowed broad control over their curriculum. *Hazelwood,* 484 U.S. at 271, 108 S. Ct. at 570. In *Bethel,* the Court likewise found that high schools could restrict speech which undermined the school's "basic educational mission." 478 U.S. at 686, 106 S. Ct. at 3165. In that case, the high school punished a student for giving a speech full of sexual innuendo at a school-sponsored assembly. *Id.* at 675, 106 S. Ct. at 3160. The *Bethel* Court found this punishment permissible, in light of the school's interest in "teaching students the boundaries of socially appropriate behavior." *Id.* at 681, 106 S. Ct. at 3163.[8]

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[8] The Court notes that cases dealing with high school students may not fully apply in the college or university context. As the Ninth Circuit has written, "[d]ifferent considerations govern application of the first amendment on the college campus and at lower level educational institutions."

A number of circuits have found similar broad university control over curriculum. The First Circuit has held that a university has substantial control over such core university concerns as "course content, homework load, and grading policy." *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419, 424 (1st Cir. 1986). The *Lovelace* court held that a university may decline to renew a nontenured teacher's employment on the grounds that his grading policy failed to comply with university standards. *Id.* In so holding, the *Lovelace* court refused to find that the teacher's grading policy was constitutionally protected, stating that "[t]he first amendment does not require that each nontenured professor be made a sovereign unto himself." *Id.*

Other courts have likewise found substantial university control over grading policies and teaching methods. *Peloza v. Capistrano Unified School Dist.*, 782 F. Supp. 1412, 1416 (C.D. Cal. 1992) (holding that a high school biology teacher has no "constitutional right to conduct himself as a loose cannon in his classroom . . . and teach scientific theories of his own choosing"), *aff'd in part and rev'd in part on other grounds*, 37 F.3d 517 (9th Cir. 1994); *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 552 (5th Cir.) (holding nontenured teacher could be terminated for refusing to give an unearned grade to a student), *cert. denied*, 457 U.S. 1106, 102 S. Ct. 2906 (1982); *Hetrick v. Martin*, 480 F.2d 705, 708-09 (6th Cir.) (upholding university's decision to decline to renew a nontenured teacher

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Nicholson v. Board of Educ., 682 F.2d 858, 863 n.4 (9th Cir. 1982). Nonetheless, many of the First Amendment concerns remain the same, regardless of the education level.

because of her pedagogical methods; the pedagogical methods at issue included stating, in the classroom, "I am an unwed mother"), *cert. denied*, 414 U.S. 1075, 94 S. Ct. 592 (1973); *Clark v. Holmes*, 474 F.2d 928, 931-32 (7th Cir. 1972) (upholding university's decision to decline to renew a nontenured teacher because of the teacher's refusal to conform to university-required course content and teaching approach), *cert. denied*, 411 U.S. 972, 93 S. Ct. 2148 (1973).

Other courts, however, have placed limits on the state's control of classroom discussion. *Keefe v. Geanakos*, 418 F.2d 359, 362 (1st Cir. 1969) (finding that a high school teacher's classroom use of an obscenity for demonstrated educational purpose was protected); *Dube v. State Univ.*, 900 F.2d 587, 598 (2d Cir. 1990) (denying qualified immunity to defendants on the grounds that a professor's classroom discussion of controversial topics was protected by the First Amendment), *cert. denied*, 501 U.S. 121, 111 S. Ct. 2814 (1991); *Parducci v. Rutland*, 316 F. Supp. 352, 356 (M.D. Ala. 1970) (holding that a high school English teacher could not be penalized for assigning a Kurt Vonnegut short story which was not inappropriate or disruptive).

Thus, a review of the case law shows that, despite eloquent rhetoric on "academic freedom," the courts have declined to cede all classroom control to teachers. The parameters of academic freedom are not distinct, particularly in relation to the potential conflict with a university's duty to ensure adequate education of its students. What is clear, however, is that invocation of the "academic freedom" doctrine does not adequately address the complex issues presented by this case. For that reason,

this Court declines to hold that SBVC's discipline of Cohen is precluded by general notions of academic freedom under the First Amendment.

B. The Government as Employer Cases

Because the doctrine of academic freedom does not clearly protect Cohen's classroom, curriculum-based speech, the Court now turns to the line of cases dealing with the government's ability to regulate its employees' speech. The Supreme Court has acknowledged the conflict inherent in public employers' restriction of employee speech. In *Connick v. Myers*, the Supreme Court confirmed the government's right as an employer to restrict employee speech, unless that speech pertains to matters of "public concern." 461 U.S. 138, 142, 103 S. Ct. 1684, 1687 (1983) (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S. Ct. 1731 (1968)), as the root of this doctrine). *Connick* discussed the discharge of a Louisiana assistant district attorney. The assistant district attorney was terminated for her workplace distribution of a "questionnaire" on office policies and morale which essentially asked for a "vote of no-confidence" in office supervisors. She argued that, inasmuch as the questionnaire dealt with the workings of a governmental agency, it was speech on a matter of public concern and therefore protected. The *Connick* Court disagreed, finding that the survey was designed to support the assistant district attorney's own personal battle with her superiors over a proposed transfer, not to objectively evaluate or comment on the workings of the district attorneys' office. 461 U.S. at 147-48, 103 S. Ct. at 1690.

Under *Connick*, this Court must first determine whether Cohen's speech can be characterized as "constituting speech on a matter of public concern." 461 U.S. at 146, 103 S. Ct. at 1690. If it can be so characterized, then the Defendants must show that the speech "substantially interfered" with government duties. 461 U.S. at 149-50, 103 S. Ct. at 1691. If it is not speech on a matter of public concern, then the government is entitled to "wide latitude in managing [its employees], without intrusive oversight by the judiciary in the name of the First Amendment," and this Court may not interfere in such managerial decisionmaking. 461 U.S. at 146, 103 S. Ct. at 1690.

Waters v. Churchill further elaborated on this approach to governmental restriction of employees' speech. ___ U.S. ___, 114 S. Ct. 1878 (1994) (plurality opinion). In that case, a nurse employed at a state-run hospital was terminated for criticizing departmental policies to a potential department employee. *Id.* In ruling that the termination did not violate the nurse's First Amendment rights, Justice O'Connor wrote for the four-Justice plurality:

> To be protected, the [government employee's] speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to " 'the interest of the State, as an employer in promoting the efficiency of the public services it performs through its employees.' "

Id. at 1884 (quoting *Connick*, 461 U.S. at 142, 103 S. Ct. at 1687). Waters expressly states that "constitutional review

of government employment decisions must rest on different principles than review of speech restraints imposed by the government as sovereign." *Id.* at 1887. The government as employer has far broader powers to restrict its employees' speech than does the government as sovereign. *Id.* at 1886. This broad power is based on the government's interest in efficiently carrying out its mission. *Id.* at 1887-88.

The Supreme Court recently affirmed this approach in *United States v. National Treasury Employees Union,* when it struck down a federal law prohibiting federal executive branch employees from receiving compensation for speeches or articles. ___ U.S. ___, 115 S. Ct. 1003, 1008 (1995). In so holding, the Court found that the prohibited speech involved matters of public concern. *Id.* at 1013. The Court further found that the government's argument that regulation was necessary to prevent workplace disruption was speculative and did not justify the burden imposed on expressive activities. *Id.* at 1015.

The *Connick* approach has been applied within an educational context. The *Pickering* Court acknowledged that,

> it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering, 391 U.S. at 568, 88 S. Ct. at 1734-35. The Ninth Circuit has previously employed a *Pickering* balancing-type test to a high-school journalism teacher's freedom of expression rights. *Nicholson v. Board of Educ.*, 682 F.2d 858, 865 (9th Cir. 1982). In *Nicholson*, a journalism teacher was terminated after, contrary to the principal's instructions, he encouraged the publication of controversial articles in the high school paper and failed to submit sensitive articles to school administrators before publication. *Id.* The *Nicholson* court found that the school had an interest in school discipline, loyalty, and harmony among co-workers, and that therefore, the teacher's termination did not violate the First Amendment. *Id.*

In this case, the record is undisputed as to what speech is at issue. This speech falls into two categories: (1) Cohen's use of vulgarities and obscenities in the classroom; and (2) Cohen's curricular focus on sexual topics such as pornography, as well as his classroom comments on sexual subjects.

1. Speech on a Matter of Public Concern

Cohen's profanity is not speech on a matter of public concern. *Yniguez v. Arizonans for Official English*, 42 F.3d 1217, 1235 n.20 (9th Cir. 1994) (*citing Waters*) (dictum) ("[T]he government would have an indisputable right to prohibit its employees from using profanity or abusive language. . . . "); *see Waters*, 114 S. Ct. at 1886 ("[W]e have never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public, or to the people with whom they work."). The Fifth Circuit has squarely held

that a college instructor's habitual classroom use of profanity is not speech on a matter of public concern. *Martin v. Parrish*, 805 F.2d 583, 585 (5th Cir. 1986); *see Dambrot v. Central Michigan Univ.*, 839 F. Supp. 477, 488 (E.D. Mich. 1993) (finding that university basketball coach's use of a racial epithet during team pep-talk was not speech on a matter of public concern). Thus, Cohen's use of profanity is not protected speech under *Connick*, and it may be regulated by the College.

However, it is less clear whether Cohen's comments on pornography and other sexual topics constitute speech on a matter of public concern. The determination of whether an employee's speech is a matter of public concern is often a difficult one, for which there are few bright-line tests. *See generally* Stephen Allred, *From Connick to Confusion: The Struggle to Define Speech on Matters of Public Concern*, 64 Ind. L.J. 43 (1988); D. Gordon Smith, Comment, *Beyond "Public Concern": New Free Speech Standards for Public Employees*, 57 U. Chi. L. Rev. 249 (1990).

A public employee's speech is constitutionally protected if it may be fairly considered to relate to "any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146, 103 S. Ct. at 1690. In determining whether an employee's speech addresses a matter of public concern, the Court must look at the " 'content, form, and context of a given statement, as revealed by the whole record.' " *Rankin v. McPherson*, 483 U.S. 378, 384-85, 107 S. Ct. 2891, 2897 (1987) (quoting *Connick*, 461 U.S. at 147-48, 103 S. Ct. at 1690) (finding a state employee's comment on the attempted assassination of President Ronald Reagan that she hoped the next attempt would succeed was speech on a matter of public

concern). This determination is made as a matter of law. *Allen v. Scribner,* 812 F.2d 426, 430 n.8 (9th Cir.), *amended,* 828 F.2d 1445 (9th Cir. 1987). Content is the most important factor in this analysis. *Johnson v. Multnomah County,* 48 F.3d 420, 1995 WL 61328, at *4 (9th Cir. Feb. 16, 1995). Moreover, [t]he inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern." *Rankin,* 483 U.S. at 387, 107 S. Ct. at 2898.

Many cases address this "matter of public concern" issue within the context of an employee's criticism of government conduct. In *Gillette v. Delmore,* the Ninth Circuit found that a fireman's criticism of fire department action, during the action in question, involved a matter of public concern. 886 F.2d 1194, 1197 (9th Cir. 1989). The *Gillette* Court wrote that the fireman's speech "concerned the manner in which police and fire fighters performed their duties on a particular occasion," and thus was entitled to constitutional protection. *Id.* at 1197; *see Hyland v. Wonder,* 972 F.2d 1129, 1139 (9th Cir. 1992) (holding that juvenile hall volunteer could not be penalized for sending memorandum critical of juvenile hall management to judges and the governing agencies), *cert. denied,* ___ U.S. ___, 113 S. Ct. 2337 (1993); *Burgess v. Pierce County,* 918 F.2d 104, 106 (9th Cir. 1990) (per curiam) (holding that fire marshall's opposition to county ordinance was protected speech on a matter of public concern); *Allen v. Scribner,* 812 F.2d 426, 431. (9th Cir.), *amended,* 828 F.2d 1445 (9th Cir. 1987) (holding that state entomologist's public criticism of state's medfly infestation project was speech on a matter of public concern).

In those cases, the courts focused on determining whether the statements at issue were protected speech on government conduct or unprotected speech dealing with the "minutiae of workplace grievances." *See Johnson v. Multnomah County*, 1995 WL 61328, at *2 (finding that county employee's criticism of her supervisor as part of the "good old boy network" involved in misconduct and mismanagement was speech on a matter of public concern, even though there was evidence that the employee was personally "embittered"); *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) (holding that police officer's public criticism of police pay rate was speech on a matter of public concern because "[s]peech by public employees may be characterized as not of 'public concern' when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of governmental agencies"). The court of appeals has held that "[o]ne critical inquiry is whether the employee spoke in order to bring wrongdoing to light or merely to further some purely private interest." *Havekost v. U.S. Dep't of Navy*, 925 F.2d 316, 318 (9th Cir. 1991) (holding that grocery bagger's circulation of petition calling for discharge of head grocery bagger was not speech on a matter of public concern).

While these government criticism cases constitute the scenario most often considered under *Connick*, numerous cases have applied *Connick* where, as here, the speech at issue was unrelated to government conduct. These cases, for example, have dealt with comments about political figures as in *Rankin* and with speaking Spanish on the job as in *Yniguez*. The Fifth Circuit has held that a high school

teacher's supplemental reading list was not speech on a matter of public concern. *Kirkland v. Northside Ind. Sch. Dist.*, 890 F.2d 794, 802 (5th Cir. 1989), *cert. denied*, 496 U.S. 926, 110 S. Ct. 2620 (1990). Further, a firefighter's reading of Playboy Magazine during his off-duty hours at the firehouse has been found to be protected expression related to matters of public concern because the magazine included articles "relating to politics, sports, arts and entertainment." *Johnson v. County of Los Angeles Fire Dep't*, 865 F. Supp. 1430, 1436 (C.D. Cal. 1994).

Based on this case law, the Court finds that the pornography topic and the other sexually-oriented topics discussed in Cohen's classes are matters of concern to the community and thus are topics of public concern. The Court further finds that the record shows that the content and form of Cohen's statements addressed these topics. Thus, Cohen's commentary on those topics is commentary on a matter of public concern. Therefore, the first prong of the *Connick* test for protected government employee speech is satisfied. The Court must now address the balancing prong of the *Connick* test.

2. Balancing Test

Because Cohen's speech in assigning sexually focused topics and his commentary on those topics relates to a matter of public concern, the burden shifts to Defendants to show that their legitimate interests outweigh Cohen's First Amendment interests. *Rankin*, 483 U.S. at 388, 107 S. Ct. at 2899; *Johnson v. Multnomah County*, 1995 WL 61328 at *1. In applying this balancing test, the Court must consider the manner, time, place, and

context of the employee's expression. *Rankin*, 483 U.S. at 388, 107 S. Ct. at 2899. The state's burden in justifying the regulation varies according to the nature of the employee's expression. *Connick*, 461 U.S. at 150, 103 S. Ct. at 1691-92. Other pertinent considerations include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin*, 483 U.S. at 388, 107 S. Ct. at 2899 (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 570-73, 88 S. Ct. 1731, 1735-37 (1968)). Essentially, the state's interest is based on "the effective functioning of the public employer's enterprise." 483 U.S. at 388, 107 S. Ct. at 2899.

The Court must consider the employer's interest in effectively functioning, and whether that effective function is disrupted. *Thomas v. Carpenter*, 881 F.2d 828, 830-31 (9th Cir. 1989) (holding that sheriff's deputy could not be penalized for statements made during an election in which he challenged the incumbent sheriff), *cert. denied*, 494 U.S. 1028, 110 S. Ct. 1475 (1990). In so determining the government's interest, the Court should consider whether the statement at issue impairs discipline, co-worker relations, or impedes the performance of the speaker's duties or the operation of the enterprise. *Id.* at 831. If the speech at issue directly deals with issues of public concern, a stronger showing of disruption is required. *Id.* (citing *McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1989)). The context of the situation determines how strong a showing must be made. *Id.* A showing of real,

not imagined disruption, is required. *McKinley*, 705 F.2d at 1115.

In *I.N.S. v. Federal Labor Relations Auth.*, the Ninth Circuit held that the First Amendment interests of an I.N.S. agent in wearing a pro-union button on his uniform while he was on duty were outweighed by the agency's efficient functioning interest in presenting an easily recognizable image to the public and fostering *esprit de corps*. 855 F.2d 1454, 1466 (9th Cir. 1988). In so holding, the court noted that the regulation at issue was not directed at a particular viewpoint or even at expression per se. *Id.* Pre-*Connick*, the Ninth Circuit declined to apply *Pickering*'s protection of public employee speech to police officers publicly critical of police department tactics, stating that "[s]ubstantial differences between the public interest in education and the public interest in safety and order justify a difference in the standards by which the respective institutions may protect themselves from attempted destruction by their employees." *Byrd v. Gain*, 558 F.2d 553, 554 (9th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S. Ct. 1282 (1978). *Byrd*'s distinction between teachers and police officers has been cited by subsequent Ninth Circuit cases as highlighting the need to consider the context of the statement when applying the second prong of the *Connick-Waters* test. *Thomas*, 881 F.2d at 831; *Allen*, 812 F.2d at 432.

In *Wheaton v. Webb-Petett*, the court of appeals upheld the termination of a managerial state employee who, during informational meetings, made remarks "unsupportive" of a new state program to employees responsible for implementing that program. 931 F.2d 613, 618 (9th Cir.

1991). The *Wheaton* court found that, although the manager had a strong interest as a citizen in dissenting as to the new program, that interest was outweighed by the risk that his reiterated objections would endanger the implementation of the new program. *Id.* In line with that reasoning, the court of appeals has similarly held that an employee's comments on the government's behalf may be restricted by the government. *Kotwica v. City of Tucson*, 801 F.2d 1182, 1184-85 (9th Cir. 1986) (holding that government spokesperson's comments to media on proposed city program, when she had been expressly instructed not to comment on the program, were not protected because of the government's interest in the accurate announcement of its policy).

The Ninth Circuit recently applied the *Waters-Connick* balancing test to an Arizona law prohibiting state employees from speaking languages other than English on the job. *Yniguez v. Arizonans for Official English*, 42 F.3d 1217, 1234-35 (9th Cir. 1994). In applying the balancing test, the court of appeals found that the state law was unconstitutional, because there was no evidence that the state's interest in efficiency was served by the language prohibition. *Id.* at 1239. The Ninth Circuit did not directly address the question of whether speaking a language other than English actually qualifies as speech on a matter of public concern but merely noted that the fact that the speech occurred as part of the performance of official duties did not dictate a result. *Id.* at 1235.

The College brings forth substantial, uncontroverted evidence showing that the educational process was disrupted by Cohen's focus on sexual topics and teaching style. There is testimony from the complaining student

and from other students in the class that Cohen's sexually suggestive remarks, use of vulgarities and obscenities, and the topics for discussion prevented them from learning.

Furthermore, written evaluations of Cohen by his colleagues done in November of 1992, before Murillo filed her grievance against Cohen, show that while his colleagues respected Cohen as a teacher, several of them entertained doubts as to the efficacy of his confrontational teaching methods. According to one peer evaluator who observed a class in which Cohen discussed and assigned a paper on the topic of consensual sex with children, Cohen's

> specific focus impedes academic success for some students . . . I question whether or not many of our students have the academic preparation and/or emotional maturity (stability) to cope with the nature of Mr. Cohen's assignments.

Opp. to Mot. Prelim. Inj., Bundy Decl., Ex. 14 at 363.

Another observer stated that Cohen's approach to the topic of "the pros or the cons of consensual sex with children" did not foster unfettered discussion by students but instead "require[d] self-censorship rather than complex analysis of an important issue." Opp. to Mot. Prelim. Inj., Bundy Decl., Ex. 14 at 361. The evaluator further wrote that,

> [c]ertainly the issue of what in this society is considered to be sexual abuse deserves discussion. But given the student population, it deserves sensitive, complex discussion – not the

> reductionist approach that Mr. Cohen's assignment requires. Rather than fostering free inquiry, Mr. Cohen's assignment as stated undermines the crucial nature of the issue.

Opp. to Mot. Prelim. Inj., Bundy Decl., Ex. 14 at 361.

Lastly, Cohen himself concedes that his teaching methods do not work with every student. He has stated that he deliberately uses an "abrasive" teaching style to elicit a response from his students. He admitted during the hearing before the Board that, while his style was effective as to some students, it was not as to others: "[T]here's always a sort of ratio between success and failure. Techniques work with one student and not another. . . . " Opp. to Mot. Prelim. Inj., Bundy Decl., Ex. 17 at 447 (11/11/93 Hearing Tr. at 46). Moreover, in answer to a question as to whether he considered himself an excellent teacher, Cohen replied, "That would depend on the student. A teacher is good with one student and not so good with another, and that has something to do with the student's perception of the teacher. One cannot be all things to all students." Opp. to Mot. Prelim. Inj., Bundy Decl., Ex. 17 at 453 (11/11/93 Hearing Tr. at 52).

In fairness, the Court must note that there is evidence in the record that Cohen's teaching style is effective for at least some students. Cohen's colleagues have stated that he is a gifted and enthusiastic teacher. Furthermore, according to the chair of the English Department (who is a defendant in this action), Cohen's teaching style is within the range of acceptable academic practice. The record also contains statements from several students to the effect that Cohen's challenging classroom style contributed to their learning experience. Moreover, the

record contains positive student evaluations of Cohen submitted by English 101 and English 015 classes for the Fall 1992 and Fall 1993 semesters. However, this evidence does not controvert the evidence showing that the learning process for a number of students was hampered by the hostile learning environment created by Cohen.

In applying a "hostile environment" prohibition, there is the danger that the most sensitive and the most easily offended students will be given veto power over class content and methodology. Good teaching should challenge students and at times may intimidate students or make them uncomfortable. In a different context, the Supreme Court has previously refused to ban all material which offends the sensibilities of society's most sensitive and vulnerable members. *Butler v. Michigan*, 352 U.S. 380, 383-84, 77 S. Ct. 524, 525-26 (1957) (holding that a state statute prohibiting all distribution of written material harmful to minors was "burn[ing] the house to roast the pig" because it "reduce[d] the adult population of Michigan to reading only what is fit for children"). Colleges and universities, as well as the courts, must avoid a tyranny of mediocrity, in which all discourse is made bland enough to suit the tastes of all students.

However, colleges and universities must have the power to require professors to effectively educate all segments of the student population, including those students unused to the rough and tumble of intellectual discussion. If colleges and universities lack this power, each classroom becomes a separate fiefdom in which the educational process is subject to professorial whim. Universities must be able to ensure that the more vulnerable

as well as the more sophisticated students receive a suitable education. The Supreme Court has clearly stated that the public employer must be able to achieve its mission and avoid disruption of the workplace. Within the educational context, the university's mission is to effectively educate students, keeping in mind students' varying backgrounds and sensitivities. Furthermore, the university has the right to preclude disruption of this educational mission through the creation of a hostile learning environment. As the *Yniguez* court noted, public employers must have the authority to determine what tasks its employees perform. *Yniguez*, 42 F.3d at 1235 n.20.

The restrictions imposed by Defendants are not onerous. The College has required Conen to issue a syllabus at the beginning of each semester for each of his classes. Cohen must attend a sexual harassment seminar. Cohen must be formally evaluated, and he is directed to "be sensitive" to students. These restrictions are tailored and reasonable, in light of the issues involved. The College is not directly censoring Cohen's choice of topics or teaching style. In essence, the College is requiring Cohen to warn students of his teaching style and topics so that those students for whom this approach is ineffective may make an informed choice as to their educations.

Thus, even though Cohen's speech on the topic of pornography was speech on a matter of public interest, the College's interest in effectively educating its students outweighs Cohen's interest in focussing on sexual topics in the classroom, to the extent that the university only requires Cohen to warn potential students of his teaching style and topics.

As an alternative basis for its ruling, the Court recognizes the constitutional implications of the College's substantial interest in preventing the creation of a hostile, sexually discriminatory environment which would disrupt the educational process. The Supreme Court has found that creating a "hostile environment" based on gender is a form of sexual harassment which violates Title VII. *Harris v. Forklift Sys., Inc.*, ___ U.S. ___, 114 S. Ct. 367, 370-71 (1993); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64, 106 S. Ct. 2399, 2404-05 (1986).[9] Several circuits, including the Ninth Circuit, have held that sexual harassment is a type of sexual discrimination which violates the Equal Protection Clause of the Fourteenth Amendment. *Bator v. Hawaii*, 39 F.3d 1021, 1027 (9th Cir. 1994) (holding that a claim of sexual harassment "can be impermissible sex discrimination in violation of the Equal Protection Clause"); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1185 (7th Cir. 1986) ("Sexual harassment of female employees by a state employer constitutes sex discrimination for purposes of the equal protection clause of the fourteenth amendment."); *Starrett v. Wadley*, 876 F.2d 808, 814-15 (10th Cir. 1989) (holding that terminated state employee plaintiff had a 42 U.S.C. § 1983 cause of action for supervisor's propositions, physical contact, and quid pro quo threats).[10]

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[9] Cohen argues that the fact the complaining party in this case is a student, rather than an employee, makes these cases inapposite. However, it seems clear that the issue in those cases is the status of the harassers – the state employees – not the status of the people harassed. Thus, it is immaterial that the complaining student in this case is not a state employee.

[10] The College cites Cal. Educ. Code § 212.6, which requires SBVC, along with other educational institutions, to adopt a

III. Cohen Received Fair Notice Under the Speech Policy, and the Policy is Not Facially Invalid

Cohen further argues that, under the First Amendment, he is guaranteed "fair notice" of restrictions on protected speech, and that he did not receive such notice. Cohen's argument fails under the *Connick-Waters* line of cases which hold that the government as employer has broader procedural, as well as substantive, power in restricting speech. *Waters*, 114 S. Ct. at 1886. For example, a public employer may prohibit its employees from " 'being rude to customers,' " a standard that in another context would be impermissibly vague. *Waters*, 114 S. Ct. at 1886-87. Thus, even if the sexual harassment policy at issue here would be considered impermissibly vague or overbroad if applied to the public at large, the Court holds that the College as a public employer has greater substantive and procedural power to regulate its employees' speech, and that the policy therefore is not invalid on its face. Moreover, the Court holds that Cohen

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written policy against sexual harassment. While this possible conflict in duties makes the College's position more sympathetic, this statutory duty does not mandate a decision in the College's favor. Thus, the fact that Defendants were statutorily required to implement this sexual harassment policy has little relevance to this Court's determination of the policy's constitutionality under the First Amendment. Likewise irrelevant is the College's citing of Title IX, 20 U.S.C. §§ 1681-1688 (prohibiting sexual harassment in the educational environment) and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S. Ct. 1028 (1992) (allowing a high school student to maintain a damages claim against her school for a violation of Title IX).

received fair notice of what speech was prohibited by the policy.

Cohen cites two cases in which public university "hate speech" codes governing *student* speech were struck down as unconstitutionally vague and overbroad. Although the speech codes in those cases regulated student speech, not just the speech of state employees, their language closely parallels the language at issue here. In *Doe v. University of Michigan*, the university restricted speech which, among other things "stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex . . . and that . . . [c]reates an intimidating, hostile, or demeaning environment for educational pursuits. . . . " 721 F. Supp. 852, 856 (E.D. Mich. 1989). The university speech code further banned "sexual advances, requests for sexual favors, and verbal or physical conduct that stigmatizes or victimizes an individual on the basis of sex . . . where such behavior . . . [c]reates an intimidating, hostile, or demeaning environment for educational pursuits, employment. . . . " *Id.* The district court struck down these regulations as facially vague and overbroad, and as applied. *Id.* at 864-67.

The *UWM Post, Inc. v. Board of Regents* court similarly struck down as vague and overbroad University of Wisconsin regulations prohibiting

> racist or discriminatory comments, epithets or other express behavior directed at an individual . . . if such comments intentionally: . . . [c]reate an intimidating, hostile, or demeaning environment for education. . . .

774 F. Supp. 1163, 1178, 1180 (E.D. Wis. 1991); *see Dambrot v. Central Michigan Univ.*, 839 F. Supp 477 (E.D. Mich. 1993) (striking down hate speech code as facially invalid, even though not unconstitutional as applied to university coach under *Connick*).

However, the speech codes at issue in the above cases all restricted student speech, not merely employee speech as here. The SBVC anti-sexual harassment policy, which restricts only employee speech, is accorded procedural leeway under *Connick* and is not unconstitutional. This case may thus be distinguished from *Doe v. University of Michigan* and *UWM Post, Inc. v. Board of Regents.*

IV. Conclusion

The Court thus holds that, under *Connick* and *Waters*, the College has the authority to require Cohen to distribute a syllabus detailing his controversial teaching style, attend an anti-sexual harassment seminar, and to submit to a formal evaluation of his teaching methods. The College is entitled to issue these narrowly tailored requirements because it has shown that its educational mission has been disrupted for some students by Cohen's teaching style. The College's substantial interest in educating all students, not just the thick-skinned ones, warrants the College's requiring Cohen to put potential students on notice of his teaching methods. The College's interest in fulfilling its educational mission is further bolstered by the constitutional implications of sexual harassment.

In so holding, the Court notes that this ruling goes only to the narrow and reasonable discipline which the College seeks to impose. A case in which a professor is

terminated or directly censored presents a far different balancing question. Further, the Court notes that the College must avoid restricting creative and engaging teaching, even if some over-sensitive students object to it.

Judgment is hereby rendered in Defendants' favor on all of Plaintiff's First Amendment and Cal. Const. art. I., § 2(a) claims.

IT IS SO ORDERED.

/s/ RONALD S.W. LEW
RONALD S.W. LEW
United States District Judge

DATED: April 13, 1995

NO. CV-94-1083-RSWL *Dean Cohen v. San Bernardino Valley College et al.*, Bench Trial on Briefs
(cohen.rulingj)

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE

4/14/95
/s/ Helen G. Fagen

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEAN COHEN, Plaintiff, vs. SAN BERNARDINO VALLEY COLLEGE et al. Defendant	CV-94-1083-RSWL-GHKx FINAL RULING ON DUE PROCESS CLAIM (Filed Apr. 14, 1995)

The Court rules that Plaintiff Cohen's Due Process claim is meritless. First, Cohen was penalized only after two extensive hearings in which he was represented by an attorney and allowed to put on his own witnesses and cross-examine adverse witnesses. Secondly, Cohen's claim to fair notice fails because the Court finds that the policy at issue adequately put Cohen on notice as to what conduct was prohibited by the policy. Lastly, Cohen's allegations as to San Bernardino Valley College's violation of its own procedures fails to give rise to a due process violation. *Newman v. Burgin*, 930 F.2d 955, 960 (1st Cir. 1991).

On the above grounds, this Court therefore finds that Cohen may not recover on his Due Process claim under U.S. Const. amend. V and XIV or under Cal. Const. art. I, § 7(a). Judgment is hereby rendered against Plaintiff on his first claim for relief.

IT IS SO ORDERED.

Ronald S. W. Lew
RONALD S.W. LEW
United States District Judge

DATED: April 13, 1995

NO. CV-94-1083-RSWL *Dean Cohen v. San Bernardino Valley College et al.*

(cohen.dp\j)

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERED BY FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED: 4/14/95
Helena E. Fogen
DEPUTY CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DEAN COHEN, Plaintiff, vs. SAN BERNARDINO VALLEY COLLEGE et al. Defendant	CV-94-1083-RSWL-GHKx EVIDENTIARY RULINGS (Filed Apr. 14, 1995)

I. Evidentiary Objections

1) Defendant objects on the grounds of relevance to the admission of the deposition testimony taken August 31, 1994 of Stuart Bundy, Chancellor of the District. Defs.' Trial Brief (TB) at 5-8; Pl.'s Opening Trial Brief (OTB) at 4-8. The Court **DENIES** this objection.

2) Plaintiff objects to Exs. 15 and 16 offered by Defendants. Ex. 15 is the transcripts of telephone conversation between Suzy Moore, attorney for Anita Murillo (the student who filed an administrative complaint against Plaintiff) and Suzanne Milleson. Ex. 16 is the transcript of a telephone conversation between Suzy Moore and Byonca Christopat. These transcriptions were received into evidence by the Board Murillo's administrative action. Plaintiff objects to these transcript as hearsay under Fed. R. Evid. 801 and 802, as unsworn out-of-court statements by a declarant not subject to cross examination offered to prove the truth of the matter asserted. Pl.'s OTB at 9. The Court **SUSTAINS** this objection.

IT IS SO ORDERED.

Ronald S. W. Lew
RONALD S.W. LEW
United States District Judge
DATED: April 13, 1995

NO. CV-94-1083-RSWL *Dean Cohen v. San Bernardino Valley College et al.*

(cohen.obj\j)

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERED BY FIRST CLASS MAIL POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED: 4/14/95
Helena E. Fogen
DEPUTY CLERK

APPENDIX E

PHILLIP L. KOSSY, Bar No. 071543
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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DEAN COHEN, Plaintiff, v. SAN BERNARDINO VALLEY COLLEGE, et al., Defendants.	CASE NO. 94-1083 RSWL (GHKx) JUDGMENT FOR DEFENDANTS (Filed May 26, 1995)

This action came on for trial before the Court, the Honorable Ronald S. W. Lew, District Judge presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED,

That Plaintiff take nothing by his action, that the action be dismissed on the merits and that Defendants recover of Plaintiff their costs of action in the amount of $_____.

DATED: MAY 26, 1995

Ronald S. W. Lew
JUDGE OF THE DISTRICT COURT

SUBMITTED BY:

LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation
PHILLIP L. KOSSY
SUSAN J. BOYLE

By: /s/ Phillip L. Kossy
PHILLIP L. KOSSY, Bar No. 071543
Attorneys for Defendants

APPROVED AS TO FORM;

ROHDE & VICTOROFF

By: /s/ Stephen F. Rohde
STEPHEN F. ROHDE, Bar No. 51446
Attorneys for Plaintiff
DEAN COHEN

APPENDIX F

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

DEAN COHEN,

Plaintiff,

vs.

SAN BERNARDINO VALLEY COLLEGE, THE BOARD OF TRUSTEES OF SAN BERNARDINO COMMUNITY COLLEGE DISTRICT, CHARLES H. BEEMAN, LOIS J. CARSON, ALLEN B. GRESHAM, HORACE D. JACKSON, CARLTON W. LOCKWOOD, JR., JUDITH VALLES, and EUGENE WOOD, individually and in their capacities as Trustees of the San Bernardino Community College District, STUART BUNDY, individually and in his capacity as Chancellor of SAN BERNARDINO VALLEY COLLEGE, DONALD SINGER, individually and in his capacity as President of SAN BERNARDINO VALLEY COLLEGE, GLORIA HARRISON, individually and in her capacity as Chair of the Humanities Division of SAN

CIVIL ACTION NO. 94-1083-RSWL-GHKx

~~PROPOSED~~ ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

DATE: 4/4/94
TIME:9:00 a.m.
DEPT:21

(Filed Apr. 21, 1994)

BERNARDINO VALLEY)
COLLEGE, ROBERT RIPPY,)
individually and in his)
capacity as Chair of the)
English Department of SAN)
BERNARDINO VALLEY)
COLLEGE, the FACULTY)
GRIEVANCE COMMITTEE OF)
SAN BERNARDINO VALLEY)
COLLEGE, ANTONIO)
DUARTE, CAROLYN)
LINDSEY, SYLVIA SHERMAN,)
and JUAN ZEPEDA,)
individually and in their)
capacities as members of the)
Faculty Grievance Committee)
of San Bernardino Valley)
College, and JOHN C.)
MOLINA, individually and in)
his capacity as Consultant to)
the Faculty Grievance)
Committee of San Bernardino)
Valley College,)
)
Defendants.)

Plaintiff, DEAN COHEN's Motion for Preliminary Injunction came on regularly for hearing on April 4, 1994, at 9:00 a.m., the Honorable Ronald S. W. Lew, Judge Presiding. Appearing for Plaintiff, DEAN COHEN, was attorney Stephen F. Rohde, of Rohde & Victoroff. Appearing for Defendants were attorneys Amy Greyson, of Brunick, Alvarez & Battersby, and Phillip Kossy, of Littler, Mendelson, Fastiff, Tichy & Mathiason.

WHEREAS, the Court having considered the pleadings and papers filed in support of and in opposition to the Motion, and the oral argument of counsel,

IT IS HEREBY ORDERED AND DECREED AS FOLLOWS:

1. Plaintiff's Motion for Preliminary Injunction is hereby denied, for the reasons set forth in the attached transcript of the proceedings on April 4, 1994 (attached hereto as Exhibit "A").

DATED: APR 21, 1994

By: Ronald S. W. Lew
RONALD S.W. LEW
UNITED STATES DISTRICT JUDGE

Exhibit A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE RONALD S.W. LEW, JUDGE PRESIDING

DEAN COHEN, PLAINTIFF, VS. SAN BERNARDINO COMMUNITY COLLEGE DISTRICT, ET AL., DEFENDANTS.	)	NO. CV 94-1083-RSWL-GHKX

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, APRIL 4, 1994

SANDRA L. BECERRA – CSR 10024
OFFICAL COURT REPORTER
412 – UNITED STATES COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012
(213) 894-6601

APPEARANCES OF COUNSEL:

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- AND -
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INDEX

HEARING RE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION 4

COURT'S RULING 5

[p. 4] LOS ANGELES, CALIFORNIA; MONDAY, APRIL 4, 1993; 9:20 A.M.

THE CLERK: ITEM NO. 8: CIVIL 94-1083, DEAN COHEN VERSUS SAN BERNARDINO VALLEY COLLEGE, ET AL.

COUNSEL, PLEASE STATE YOUR APPEARANCES.

MR. ROHDE: GOOD MORNING, YOUR HONOR. STEPHEN ROHDE FOR THE PLAINTIFF.

MS. GREYSON: AMY GREYSON FOR THE DEFENDANTS.

MR. KOSSY: PHILLIP KOSSY FOR THE DEFENDANTS, YOUR HONOR.

THE COURT: THIS MATTER IS SET HERE AS PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION. WITH REGARD TO THE PRELIMINARY INJUNCTION REQUESTED, THE PAPERS SUBMITTED TO THE COURT HAVE BEEN REVIEWED.

HOW DO YOU WISH TO PROCEED?

MR. ROHDE: NOTHING FURTHER, YOUR HONOR, UNLESS YOU HAVE ANY QUESTIONS.

MS. GREYSON: NOTHING FURTHER, YOUR HONOR, UNLESS YOU HAVE ANY QUESTIONS.

THE COURT: DO YOU WISH TO FURTHER ARGUE, OR DO YOU WANT TO SUBMIT IT?

MR. ROHDE: WE'RE SUBMITTING, YOUR HONOR.

MS. GREYSON: WE WILL SUBMIT, YOUR HONOR.

ALSO JUST ONE COMMENT. THE JEFFRIES CASE, WHICH WAS CITED BY THE PLAINTIFF, IS IN DIRECT SUPPORT FOR WHAT THE [p. 5] DISTRICT HAS ATTEMPTED TO DO –

THE COURT: DO YOU WANT TO STAND UP.

MS. GREYSON: *JEFFRIES VERSUS HARLESTON* IS IN DIRECT SUPPORT FOR WHAT THE PLAINTIFF HAS BEEN ORDERED TO DO IN THIS CASE BY THE DISTRICT. SPECIFICALLY, THE JEFFRIES CASE AUTHORIZES CONTINUED MONITORING OF A PROFESSOR WHO HAS BEEN DEEMED TO HAVE POTENTIALLY ACTED IN A WAY WHICH WOULD DISRUPT THE EDUCATIONAL ENVIRONMENT, AND FOR THAT REASON WE WOULD REQUEST THAT THE DISTRICT'S ACTIONS BE SUSTAINED.

MR. ROHDE: YOUR HONOR, THAT POINT COULD HAVE BEEN RAISED IN THE OPPOSITION. THE JEFFRIES CASE UPHELD A $400,000 JUDGMENT AGAINST CITY COLLEGE OF NEW YORK IN FAVOR OF A PROFESSOR WHOSE FIRST AMENDMENT RIGHTS WERE VIOLATED.

THANK YOU.

THE COURT: ALL RIGHT. HAVING REVIEWED THE PAPERWORK SUBMITTED ON BEHALF OF THE MOVANT AND IN OPPOSITION TO THE – A REQUEST FOR THE PRELIMINARY INJUNCTION AND HEARING THE ARGUMENTS ORALLY

HERE IN COURT, I AM GOING TO DENY THE MOTION AS REQUESTED BY THE PLAINTIFF.

PLAINTIFF HAS FAILED TO SHOW TO THIS COURT THAT THERE WILL BE A LIKELIHOOD OF SUCCESS ON THE MERITS AND THAT THERE IS IRREPARABLE INJURY. IF NOT THAT, THEY HAVE FAILED TO SHOW THAT THERE IS AN EXISTENCE OF A SERIOUS QUESTION AS TO THE MERITS OF THE FIRST AMENDMENT OR THE DUE PROCESS CLAIMS. THEREFORE, I WOULD DENY THE MOTION.

[p. 6] WITH REGARD TO PLAINTIFF'S ARGUMENT THAT THERE IS AN OVERBREADTH IN THE SEXUAL HARASSMENT REGULATION, WHICH IS AT ISSUE IN THIS CASE, I WOULD FIND THAT IT IS NOT SUBSTANTIALLY OVERBROAD AND THEREFORE NOT UNCONSTITUTIONAL. THERE COULD BE LATER ARGUMENTS ON THIS, BUT HOWEVER, THIS IS THE COURT'S FINDING AT THIS JUNCTURE WITH RESPECT TO THE PRELIMINARY INJUNCTION REQUEST.

I ALSO FIND THAT IT IS SQUARELY NOT SO VAGUE AS TO BE VOID FOR VAGUENESS.

PLAINTIFF'S CLAIM THAT THE FIRST AMENDMENT RIGHTS WERE VIOLATED BY THE APPLICATION OF THE SEXUAL HARASSMENT POLICY IS ALSO UNAVAILING. THE COURT CLEARLY FINDS THAT THE CONDUCT AND SPEECH WHICH CONSTITUTES SEXUAL HARASSMENT IS SUBJECT TO REGULATION BY THE STATE, AND PLAINTIFF HAS NOT MADE A SHOWING THAT HE HAS BEEN PUNISHED IN THE PROTECTION – IN THIS AREA OF PROTECTED

SPEECH; THEREFORE, HE IS NOT LIKELY TO PREVAIL ON THE MERITS OF THIS CLAIM AS WELL.

THERE IS NO SHOWING THAT THERE IS PRIOR RESTRAINT BY THE FIRST AMENDMENT AND THE DEFENDANTS' REQUEST FOR A SYLLABUS OF ACTS BEFORE THE CLASS. THIS IS NO PRIOR RESTRAINT OF THE FIRST AMENDMENT RIGHTS. THERE IS NO SHOWING OF DUE PROCESS VIOLATIONS. THEREFORE, I WILL DENY THE REQUEST FOR A PRELIMINARY INJUNCTION AS MADE BY THE PLAINTIFF.

DEFENDANT IS TO PREPARE AN ORDER IN THE DENIAL THAT WOULD COMPORT TO THIS COURT'S ORDER. THAT IS THE RULING.

[p. 7] MR. KOSSY: THANK YOU, YOUR HONOR.

MS. GREYSON: THANK YOU, YOUR HONOR.

MR. ROHDE: YOUR HONOR, THIS IS SUCH A CRUCIAL STAGE IN THE CASE, WE WILL SEEK APPELLATE REVIEW, AND I WANTED TO KNOW IF YOUR HONOR WOULD CERTIFY THE MATTER FOR AN INTERLOCUTORY APPEAL?

THE COURT: I WILL NOT.

MR. ROHDE: VERY WELL, YOUR HONOR.

MR. KOSSY: THANK YOU, YOUR HONOR.

MS. GREYSON: THANK YOU, YOUR HONOR.

(PROCEEDINGS CONCLUDED AT 9:30 A.M.)

[p. 8] CERTIFICATE

I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPTION FROM THE STENOGRAPHIC RECORD OF THESE PROCEEDINGS.

/s/ Sandra Becerra
SANDRA L. BECERRA, CSR 10024

OFFICIAL COURT REPORTER

DATED: 4-11-94

PROOF OF SERVICE

STATE OF CALIFORNIA COUNTY OF SAN BERNARDINO

I am employed in the County of the San Bernardino, State of California. I am over the age of 18 and not a party to the within action; my business address is 1839 Commercenter West, San Bernardino, California.

On April 18, 1994, I served the foregoing document described as [PROPOSED] ORDER DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Stephen F. Rohde, Esq.
Rohde & Victroff
1880 Century Park East
Suite 411
Los Angeles, CA 90067

John W. Howard, Esq.
Individual Rights
Foundation
9911 Pico Blvd.
Suite 1290
Los Angeles, CA 90035

X (BY MAIL)

_____ I deposited such envelope in the mail at San Bernardino, California. The envelope was mailed with postage thereon fully prepaid.

__X__ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at San Bernardino, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

_____ (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

__X__ (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 18, 1994 at San Bernardino, California.

Danita King Ross

/s/ Danita King Ross
(Signature)

APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEAN COHEN, Plaintiff-Appellant, vs. SAN BERNARDINO VALLEY COLLEGE, et al., Defendants-Appellees.	)	No. 94-55551 DC# CV-94-1083-RSWL Central California (Los Angeles) ORDER (Filed May 11, 1994)

Before: HUG and D.W. NELSON, Circuit Judges

Appellant's emergency motion for an injunction pending appeal is denied. *See Lopez v. Heckler,* 713 F.2d 1432, 1435 (9th Cir.), *rev'd in part on other grounds,* 463 U.S. 1328, 464 U.S. 879 (1983).

Appellant's request for expedited consideration of the appeal is denied. The pendency of this appeal does not divest the district court of jurisdiction to proceed to a final determination on the merits of appellant's case. *See Plotkin v. Pacific Tel. & Tel. Co.,* 688 F.2d 1291, 1293 (9th Cir. 1982).

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEAN COHEN, Plaintiff/Appellant, vs. SAN BERNARDINO VALLEY COLLEGE, et al., Defendants/Appellees.	)	No. 94-55551 DC# CV-94-01083-RSWL Central California ORDER (Filed Jun. 21, 1994)

The parties have stipulated to the dismissal of this appeal under Fed. R. App. P. 42(b). The appeal is dismissed with prejudice. Attorney's fees and costs shall be allocated according to the provisions of the stipulation.

A certified copy of this order sent to the district court shall act as and for the mandate of this court.

For the Court:

CATHY A. CATTERSON
Clerk of the Court

/s/ Cathie A. Gottlieb
Cathie A. Gottlieb
Deputy Clerk

pro 6.13

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DEAN COHEN, Plaintiff, v. SAN BERNARDINO VALLEY COLLEGE, et al., Defendants.	CASE NO. 94-1083-RSWL-GHKx ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS (Filed Jul. 22, 1994)

The motion of Defendants San Bernardino Valley College, the Board of Trustees of San Bernardino Community College District and the Faculty Grievance Committee for judgment on the pleadings pursuant to rule 12(c) of the Federal Rules of Civil Procedure came on regularly to be heard on July 18, 1994, at 9:00 a.m. in Courtroom 21 of this Court before the Honorable Ronald S. W. Lew, District Judge. Defendants were represented by Littler, Mendelson, Fastiff, Tichy & Mathiason, a Professional Corporation, by Phillip L. Kossy, Esq.; Plaintiff was represented by Rohde & Victoroff, by Stephen F. Rohde, Esq. The Court, having considered the pleadings and the arguments of counsel and matters of which it has taken judicial notice, determines as follows:

1. Said defendants are "arms of the state" for the purposes of the Eleventh Amendment and said defendants, therefore, are immune from action in this Court by reason of the Eleventh Amendment; this Court, therefore, lacks jurisdiction over the action against said defendants.

2. Even if said defendants were not so immune, they are not "persons" for the purposes of Title 42, U.S.C. section 1983 and Plaintiff, therefore, fails to state a claim against said defendants under section 1983.

3. Neither said defendants nor the State of California has waived the immunity provided by the Eleventh Amendment, referred to above.

4. Given the immunity of the Eleventh Amendment, the Court lacks jurisdiction over the pendent state claims, as well as the federal claims.

5. This ruling is not intended to preclude Plaintiff from asserting any claims in state court as permitted by California law.

Upon the determinations set forth above, and good cause appearing therefore,

IT IS HEREBY ORDERED that said motion for judgment on the pleadings be, and hereby is, granted and that the action against Defendants San Bernardino Valley College, the Board of Trustees of San Bernardino Community College District and the Faculty Grievance Committee shall be dismissed.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: JUL 22 1994

RONALD S. W. LEW
JUDGE OF THE DISTRICT COURT

SUBMITTED BY:

LITTLER, MENDELSON,
FASTIFF,
TICHY & MATHIASON
A Professional Corporation
PHILLIP L. KOSSY,
Bar No. 071543

By: /s/ Phillip L. Kossy
PHILLIP L. KOSSY
Attorneys for Defendants

APPROVED AS TO FORM:

ROHDE & VICTOROFF
STEPHEN F. ROHDE,
Bar No. 51446

By: /s/ Stephen F. Rohde
STEPHEN F. ROHDE
Attorneys for Plaintiff

PROOF OF SERVICE
STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1880 Century Park East, Suite 411, Los Angeles, California 90067.

On July 22&, 1994, I served the foregoing document(s) described as **ORDER GRANTING MOTION**

FOR JUDGMENT ON THE PLEADINGS on the interested parties in this action by placing true copies thereof in sealed envelopes addressed as follows:

Phillip L. Kossy, Esq.
Littler, Mendelson, Fastiff,
Tichy & Mathiason
701 "B" Street, Suite 300
San Diego, CA 92101-8102

X BY MAIL: I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 22, 1994 at Los Angeles, California.

/s/ Sandra Washington
SANDRA WASHINGTON

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DEAN COHEN, Plaintiff, vs. SAN BERNARDINO VALLEY COLLEGE et al. Defendant	)	ORDER CV-94-1083-RSWL-GHKx (Filed Nov. 2, 1994)

The motion of individual defendants in this case for summary judgment pursuant to Fed. R. Civ. P. 56 was heard on October 31, 1994 at 9:00 a.m. in Courtroom 21 of this Court before the Honorable Ronald S.W. Lew, District Judge.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. Where the moving party does not have the burden of proof at trial on a dispositive issue, the moving party may meet its burden for summary judgment by showing an "absence of evidence" to support the non-moving party's case. *Celotex v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986).

The non-moving party, on the other hand, is required by Fed. R. Civ. P. 56(e) to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Id.* at 324, 106 S.Ct. at 2553. The non-

moving party can meet this requirement by presenting affidavits, depositions, answers to interrogatories or admissions on file. *Id.* Conclusory allegations unsupported by factual allegations, however, are insufficient to create a triable issue of fact so as to preclude summary judgment. *Exxon Corp. v. Federal Trade Comm'n*, 663 F.2d 120, 127 (D.C. Cir. 1980). Furthermore, a non-moving party who has the burden of proof at trial must present enough evidence that a "fair-minded jury could return a verdict for the (opposing party) on the evidence presented." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2512 (1986).

The Court, having considered the pleadings and the arguments of counsel and matters of which it has taken judicial notice, determines as follows:

1. In doing the actions complained of in this action, said Defendants were performing discretionary functions, and in so doing, did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The law in regards to the regulation of the classroom speech of state college professors as sexual harassment has not yet been clearly established. Defendants as government officials are thus entitled to the defense of qualified immunity against Plaintiff's first amendment claims for damages under *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). The Court thus GRANTS Defendants' motion for summary judgment on the grounds of qualified immunity as to Plaintiff's first amendment claims for damages.

2. Based on the undisputed facts, this Court finds that Plaintiff's right to due process was not violated by

Defendants' conduct. Plaintiff was given a hearing before the Faculty Grievance Committee ("Committee"). Plaintiff appealed from the Committee's decision and was given another hearing before the Board of Trustees of San Bernardino Community College District ("Board"). Witnesses testified on both sides at the hearing before the Board. Plaintiff was represented by an attorney before the Board and testified as to his version of events. These procedures adequately protected Plaintiff's due process rights. *See Davis v. Scherer,* 468 U.S. 183, 192-93 & n.10, 104 S. Ct. 3012, 3018 & n.10 (1984). A university need not conform to formal procedures in disciplining faculty members, as long as the procedures which are used are fair. *Newman v. Burgin,* 930 F.2d 955, 960 (1st Cir. 1991). Defendants' motion for summary judgment as to Plaintiff's due process claims is therefore GRANTED.

The Court hereby adopts Defendants' Statement of Uncontroverted Facts and Conclusions of Law, as amended.

IT IS SO ORDERED.

RONALD S W LEW
RONALD S.W. LEW
United States District Judge

DATED: November 2, 1994

NO. CV-94-1083-RSWL *Dean Cohen v. San Bernardino Valley College et al.*

APPENDIX K

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEAN COHEN, *Plaintiff-Appellant,* v. SAN BERNARDINO VALLEY COLLEGE; BOARD OF TRUSTEES OF SAN BERNARDINO COMMUNITY COLLEGE DISTRICT; CHARLES H. BEEMAN; LOIS J. CARSON; ALLEN B. GRESHAM; HORACE D. JACKSON; CARLTON W. LOCKWOOD, JR.; JUDITH VALLES, et al., *Defendants-Appellees.*	No. 95-55936 D.C. No. CV-94-01083-RSWL ORDER DENYING PETITION FOR REHEARING AND REJECTING THE SUGGESTION FOR REHEARING EN BANC (Filed Oct. 24, 1996)

Before: FERNANDEZ and TASHIMA, Circuit Judge, and MERHIGE, District Judge*

The panel has unanimously voted to deny the appellant's petition for rehearing. The suggestion for rehearing

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* Honorable Robert H. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

en banc was circulated to the active judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX L

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEAN COHEN, *Plaintiff-Appellant,* v. SAN BERNARDINO VALLEY COLLEGE; BOARD OF TRUSTEES OF SAN BERNARDINO COMMUNITY COLLEGE DISTRICT; CHARLES H. BEEMAN; LOIS J. CARSON; ALLEN B. GRESHAM; HORACE D. JACKSON; CARLTON W. LOCKWOOD, JR.; JUDITH VALLES, et al., *Defendants-Appellees.*	No. 95-55936 D.C. No. CV-94-01083-RSWL ORDER (Filed Oct. 23, 1996)

Before: FERNANDEZ and TASHIMA, Circuit Judge, and MERHIGE, District Judge*

The motion of Community College League of California, and others, to file amici curiae brief is DENIED. Judge Tashima would grant the motion.

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* Honorable Robert H. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

APPENDIX M

BEFORE THE BOARD OF TRUSTEES OF THE
SAN BERNARDINO COMMUNITY COLLEGE DISTRICT

In the Matter of the Appeal of DEAN COHEN	)	FINDINGS OF STATEMENT OF DECISION
In the Matter of the Appeal of ANITA MURILLO	)	

The above-referenced matter concerning the appeals of Professor Dean Cohen and Anita Murillo, from the decision of President Donald Singer, dated June 4, 1993, came on for hearing on October 14, 1993, and November 11, 1993, at 4:00 p.m., before the Board of Trustees of the San Bernardino Community College District, in the Board room located at 441 W. Eighth Street, San Bernardino, California 92401-1007.

Professor Dean Cohen was represented by attorney Stephen Rohde, of Rohde & Victoroff, throughout the hearing. Anita Murillo was represented by attorney Suzy Moore. The Board of Trustees was represented by attorney Amy Greyson, of Brunick, Alvarez & Battersby. The Board of Trustees heard oral testimony and examined the proofs offered by the parties, and the cause was submitted for decision. The Board of Trustees, being fully advised, states its Findings and Statement of Decision as follows:

FINDINGS

1. The Board of Trustees of San Bernardino Community College District hereby reaffirms the San Bernardino Community College District Policy No. 6130, "Student Sexual Harassment Plan", and California Education Code Sections 200, *et seq.*, which prohibit harassment on the basis of sex in this educational institution.

2. The Board of Trustees also adheres to the time-honored tradition of academic freedom in this college community.

3. The San Bernardino Community College District will provide to all students a learning environment free from sexual harassment, and will not tolerate sexual harassment on the part of any employee, including faculty members and other students.

4. The Board of Trustees hereby denies the appeal of Professor Dean Cohen, and sustains the findings of President Donald Singer as follows:

a. Professor Dean Cohen has been a professor with San Bernardino Community College District since 1968.

b. Anita Murillo enrolled in Professor Cohen's English 015 class in spring semester, 1992 (2/3/92 through 6/4/92).

c. On May 5, 1993, Ms. Murillo filed a Student Grievance Form alleging that Professor Cohen was guilty of sexual harassment against her throughout the semester.

d. No evidence was found that Professor Cohen solicited sex (Policy 6130-C2): Physical harassment –

Unnecessary or offensive touching, or impeding or blocking movement.

e. Evidence was found that sexual harassment which had the effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile or offensive learning environment did occur. (Policy 6130-B2/B3/C1):

> B2: Such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile or offensive learning environment.
>
> B3: Submission to or rejection of such conduct is used as the basis for academic success of failure.
>
> C1: Verbal harassment – Derogatory comments, jokes or slurs.

f. Evidence was presented which demonstrated that the material presented in class was offensive to Ms. Murillo as well as other students, both male and female, and that there was frequent use of profanity by both Professor Cohen and other students in the class, as well is in the assigned materials. Professor Cohen concedes that he intended to shock students with the content of the topics, as reflected in his own statement that he "likes to piss people off in class", and with his manner of bringing the materials to the students. When Ms. Murillo approached Professor Cohen for assistance, he failed to recognize that the offensive nature of the topics was precluding her from understanding his educational purpose in selecting

those topics, and failed to provide her with any mechanism to enable her to deal with controversial material in a manner which would facilitate her learning process.

In particular, the Board notes, and as emphasized by Professor Cohen's own colleagues during the hearing, a responsible teacher needs to know his or her students, in order to enable them to deal with, understand and utilize the material that is presented to ensure that the environment is conducive to learning. The Board finds that Professor Cohen failed to acknowledge that the class was an entry-level English class which was intended to provide an understanding of basic grammar and writing techniques for students with limited writing skills and/or exposure to academic give-and-take, and that his students, including Ms. Murillo, were having difficulty dealing with the materials. Professor Cohen himself acknowledged during the hearing that he had tried the materials as an experiment in the classroom and that, after the fact, he understands that the experiment failed.

The Board finds that during the class, as a result of the statements of Ms. Murillo and other students to him, that Professor Cohen was on notice, or should have been on notice, that his teaching method was impeding Ms. Murillo and other students in their educational process, but failed to modify his teaching methods accordingly.

As a result, Professor Cohen's conduct resulted in an intimidating, hostile or offensive environment which substantially disrupted Ms. Murillo's learning environment. The Board of Trustees finds the above to be in violation of Policy 6130-B2/C1.

STATEMENT OF DECISION

Based upon the above findings, the Board of Trustees hereby orders as follows:

1. Ms. Murillo's complaint of sexual harassment was timely filed.

2. Professor Cohen is directed to provide a syllabus or other written information regarding his teaching style, purpose, content and method to his students at the beginning of his class. Such syllabus or such written information shall be submitted to the Office of the Department Chair of English, no later than March 1, 1994, and then to the Chair of the Humanities Division no later than March 15, 1994.

3. Professor Cohen is directed to attend and complete a sexual harassment training seminar prepared by the District Office within ninety (90) days of the date of this decision.

4. Professor Cohen shall undergo a formal evaluation procedure in 1993-1994 per Article 15 of the San Bernardino Community College District SBCCD/CTA contract.

5. Educational demands/academic freedom do not supersede the prohibition on sexual harassment of students. Professor Cohen is hereby directed to be sensitive to the particular needs and backgrounds of his students, and to modify his teaching strategy when it has become apparent that his techniques have created a climate which impedes students' learning.

6. The Board of Trustees will not tolerate sexual harassment, nor the creation of an intimidating environment, in the instruction of its students. Any further violation of Policy 6130 will result in further discipline, up to and including suspension or termination.

7. The Board of Trustees hereby denies Ms. Murillo's appeal with regard to the discipline imposed on Professor Cohen. The Board of Trustees further finds that Ms. Murillo may re-take English 015 at no cost to her, or she may request consideration of a grade change through the normal procedures provided by the District.

8. This decision shall be placed in Professor Cohen's personnel file.

DATED: November 17, 1993

BOARD OF TRUSTEES
SAN BERNARDINO
COMMUNITY COLLEGE
DISTRICT

By: /s/ Horace D. Jackson
/s/ Eugene H. Wood
/s/ Charles H. Beeman
/s/ Lois J. Carson
/s/ Carlton Lockwood
Abstain:
/s/ Judith Valles
/s/ Allen B. Greshman

APPENDIX N

SAN BERNARDINO VALLEY COLLEGE

MEMORANDUM

TO: DR. DONALD SINGER
President

FROM: GRIEVANCE COMMITTEE MEMBERS
Antonio Duarte
Carolyn Lindsey
Sylvia Sherman
Juan Zepeda
George Fleming, Chairman /s/ GF
John C. Molina, Consultant

DATE: JUNE 1, 1993

SUBJECT: GRIEVANCE HEARING RESULTS

Attached is a copy of the student grievance hearing regarding Anita Murillo v. Professor Dean R. Cohen and the findings of the committee.

wlf

SAN BERNARDINO VALLEY COLLEGE

STUDENT GRIEVANCE

GRIEVANCE: SEXUAL HARASSMENT

On Wednesday, May 26, 1993 the Student Grievance Committee met to hear a complaint of sexual harassment filed by Anita Murillo, alleging that a professor, Dean R. Cohen had sexually harassed her. Evidence was presented by both Ms. Murillo and Mr. Cohen.

It should be noted that Professor Cohen requested an open hearing with all witnesses present during the hearing. Ms. Murillo requested that they not be present. After requesting assistance from President Donald Singer as provided in ARP 6090, the committee allowed each witness to testify individually and separate from the other witnesses. Professor Cohen's objections were noted.

FINDINGS OF FACTS

The committee reviewed SBVC Board Policy 6130 which described and defines student sexual harassment.

1. No evidence was found that Professor Cohen solicited sex. (Policy 6130-C2)

2. Evidence was found that sexual harassment which had the effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment did occur. (Policy 6130-B2/B3/C1)

3. Evidence was found that the material presented in class was offensive to Ms. Murillo. Professor Cohen concedes that he intended to shock students with the content of the topic. When Ms. Murillo approached Professor Cohen for assistance, the evidence indicates that he made remarks that could be interpreted as sexually suggestive. Further Ms. Murillo was not given an opportunity to select an alternate topic and was given a failing grade for non-compliance of a topic which she found offensive. The committee finds the above to be in violation of Policy 1630-B2/C1.

4. Evidence presented indicates that several students, specifically Anita Murillo, were offended by profanity and frequency of sexual topics in class discussions and assignments. Professor Cohen concedes that he often allows profanity in class and sexual topics are assigned without benefit of providing alternative materials for students to select. Several students recall that 40-50% of the topics were on sexual issues. The committee finds that Mr. Cohen has violated Policy 6130-C1.

RECOMMENDATIONS

1. Since a syllabus clearly explains to a student the expectation and requirements of the course, it would be to student's advantage to know of any controversial or offensive topics to be discussed in advance and thus have the opportunity to change sections. The committee recommends that the English Department require a syllabus.

2. Should a student find, during the first few weeks of class, that the material to be discussed is sensitive and/or offensive, that he/she be advised of his/her rights to see the Department Chair and/or Division Chair and be placed into another section.

3. The committee recommends that workshops on sexual harassment be required for all Department Heads. In-service training should explore the need for examining gender issues in today's educational climate, especially the sensitivity to the needs of a diverse and ever changing student population.

4. The committee recommends that part-time faculty have a workshop on sexual harassment as part of their orientation.

5. The committee recommends that one of the in-service sessions for faculty be on the subject of sexual

harassment, policies and laws, and that Mr. Cohen be required to attend.

6. The committee recommends that the Division Chair and the Department head monitor Mr. Cohen's classes more closely to assure that sexual harassment is not present, that it does not reoccur, and that should it reoccur, appropriate action be taken.

SUMMARY OF EVIDENCE:

The following summary of evidence collected is presented for review:

Statement of Anita M. Murillo:

1. Professor Cohen was sexually suggestive. Specifically that he asked her to meet him in a bar if she needed help with the class assignment.

2. Professor Cohen frequently included sexual material as part of class assignments which she found offensive, specifically references to female/child anatomy and incest.

3. Professor Cohen frequently made reference to being a writer for Hustler magazine and that he had written extensively on sexual topics.

4. Professor Cohen encourage profanity in his class which she found offensive.

5. Professor Cohen would not change the assigned topic, even when she approached him privately advising him that the topic was offensive.

6. When she approached Professor Cohen for help he suggested that she meet him at a bar and he'd help her.

7. Professor Cohen defended his position by refusing to help her, stating that he had academic freedom to select topics.

8. Division Chair, Bob Rippy, defended Professor Cohen's right to academic freedom, mentioning that he was tenured and nothing could be done.

9. Mr. Rippy suggested that she turn in her assignments to him rather than to Professor Cohen if she felt uncomfortable in Mr. Cohen's class.

10. She was given a failing grade even though she did complete assignments and the English 015 final. She gave all of the material to Mr. Rippy.

Statement of Professor Dean R. Cohen:

Professor Cohen called seven (7) witnesses and gave the following verbal testimony:

1. Professor Cohen denied that he made any statement that could have been construed as a sexual invitation. He did not ask her to meet him at a bar if she needed help.

2. Professor Cohen defends his right to present material that is timely and that inspires students to emote (feelings).

3. He encourages students to write as they live and to use language common to their surroundings and experience.

4. Profanity is used only to give emphasis to material and then only selectively, where its use is relevant to the topic. He denies that he uses sexual terms in an offensive manner.

5. He does not forewarn students of the topics to be covered in class since he does not believe that a

syllabus is necessary and students may drop his class at any time they wish.

6. His assignments are usually topics found in an approved test (Essay Two).

7. His class assignments focus on language acquisition and freedom of thinking to express in a pragmatic manner.

8. He agrees that he is different in his approach to teaching since he is a working writer, accustomed to current social issues.

9. He agrees that colleagues in the English Department have expressed their belief that some his topics are controversial and very sensitive.

10. Professor Cohen believes that his extensive experience as a writer, consultant and journalist allows him to offer more information to students.

11. He does advise students that he has written for Hustler magazine, however, he also added that he has written for other sources.

12. He denies that he uses sex as a topic indiscriminately. He offered examples of topics that he uses often of a non-sexual nature that inspire students to write pragmatically and freely.

13. The fact that Ms. Murillo turned in assignments and took the final did not alter the fact that she had already failed the class by not completing previous assignments and for non-attendance.

Statement of Kathy Flynn, Adult Reentry Coordinator:

Ms. Flynn testified that she has spoken to approximately ten (10) students who have complained about Professor Cohen's lectures. One of these students is Anita Murillo.

The other students did not pursue the filing of a grievance. At the request of Dr. John Molina, Vice President of Student Services, Ms. Flynn contacted three of four randomly selected students who were in the English 015 class with Ms. Murillo. Ms. Flynn's notes of these telephone conversations are attached.

Statement of Witnesses for Professor Dean R. Cohen:

Statement of Gloria Harrison, Humanities Division Chair:

Ms. Harrison testified that she was one of two evaluators of Professor Cohen's class. She observed an English 101 class (Fall of 1992) which was discussing child pornography and child consensual sex. It was her impression that the topic had been dropped by Professor Cohen because he could not find enough information on the topic to justify a research project. The atmosphere was amicable and Professor Cohen appeared to have good rapport with students.

Statement of Maria Fierro, Student:

Ms. Fierro testified that Professor Cohen was never offensive. There were no inappropriate comments or suggestive comments made by Professor Cohen. She was in Professor Cohen's English 015 class during the Spring semester of 1992. They discussed pornography and cannibalism openly in class as part of a reading assignment, however it was handled well and she was not offended by the topics. She is not aware of any student that was offended by class assignments or discussions.

Statement of Evelyn Cooper, Student:

Ms. Cooper testified that she was in Professor Cohen's English 101 class in Spring of 1992. She described the environment as good. The assignment on pornography and on cannibalism was not offensive to her and she did not feel it was offensive to other women.

Statement of Carolyn Bradehorst, Student:

Ms. Bradehorst testified that she was a student in English 101. Topics in the class were controversial but presented professionally. There was a lot of discussion and feedback. There were no sexual overtones.

Statement of Bob Rippy, English Department Chair:

Mr. Rippy testified that Anita Murillo had complained to him about her experience in Professor Cohen's class sometime during the Spring semester of 1993. The student had complained about a writing assignment. He referred to notes of May 3, 1993 in which the student complained that vulgar jokes, sexual content and inappropriate sexual remarks were common place in Professor Cohen's class during the Spring semester of 1992 in English 015. He advised the student that Professor Cohen's topic was a legitimate exercise and she could pursue her complaint if she wished. He referred her to Vice President Molina's office.

On May 14, I called four students enrolled in Section 1094 Eng 015 Spring 94
of 4 students
3 received 'C's.
1 received 'F'

The first student was no longer at the number listed in records (F-grade)
(2) 4:15 pm. male Hispanic student (C grade)
KF? I am calling per V.P. Students with problems. There have been some concerns from students regarding the subject matter. What topics were discussed?
Student "Some were -- uh -- pretty disgusting"
KF? "Like what?"
Student "Oh pornography; were you for it or against it." "Always topics on sex"
KF? "Would you say it was offensive to you?
Student "Oh --- well --- not really"
KF? "Would you say it was subjects you'd like discussed in front of your wife"
Student "Oh NO!".
KF? "What percent of the topics would you say were on sex?"
Student "About 50%"

N-9

BEST AVAILABLE COPY

③ 4:25 pm female (age=) student (C grade)

KF? "I've been asked by the V.P to call some students who attended Mr. Cohen's English class. There have been some concerns about the subject matter"

Student: "Pornography?"

KF? "Was it offensive to you?"

Student "Not to me but to a lot of other students. Lots of students dropped because of it"

KF? "What percent of subjects were on sex?"
"About 45-50%"

④ 4:45 pm male Asian student (C grade)

KF? "I'm KF I've been asked to called students who attended Mr. Cohen's English class Spring 92 because some students had concerns with the topics in the class

Student "I don't know topics?"

KF? "Some students didn't like the subject he talked about"

Student "I didn't have any problem about the subject but many students complained about the subject he talked about

KF? "What subject was that?"

Student "About Sex. I didn't have any problem I liked Mr Cohen but many people didn't like it"

KF? "Did they tell Mr. Cohen they didn't like it?"

Student "No when he was out of the class they would talk about it Mostly the many female students complained about it"

Mr. Rippy vaguely recalled that he had asked Ms. Murillo to turn in assignments to him rather than Professor Cohen. He vaguely recalled that he had given the assignments and final examination to Professor Cohen. He did not know the outcome of the assignments or of the final examination.

Mr. Rippy mentioned that a yearly evaluation by a peer had questioned Professor Cohen's topics, deeming them inappropriate. A departmental meeting was held and the issue of sexually sensitive topics as class assignments was aired. Although several staff members objected, no remedy was offered other than to remain with the academic freedom philosophy which protects a professor's selection of course content.

Statement of Isom Green, Jr., Student:

Mr. Green described the class environment as open, a good experience. "Professor Cohen is one of the better instructors I've had." There are few obscene words spoken. "I think the only word I've heard is 'shit' and this was part of an assignment. It was appropriate to the discussion." Mr. Green was a student in the English 101 class during the Spring semester of 1993.

Statement of James A. Chapman, Jr., Student:

Mr. Chapman was a student in the English 101 class during the Spring semester of 1993. Mr. Chapman stated that Professor Cohen had helped him a lot. He was creative. He could not recall any topic that was offensive.

Additional Information Reviewed:

The committee also reviewed the following:

1. Typewritten statement by student Suzanne Milleson (attached).
2. Typed interview of student Henry Merten and Professor Cohen (attached).
3. Typed letter by Spencer Eth, M.D. (attached).
4. Memo telephone message dated 5/13/93 of student Bradley Snowball to Dr. Molina, signed by "Wilma," Dr. Molina's secretary (attached).
5. Telephone message dated 5/13/93 of student Alma Torres signed by J. C. Molina (attached).

May 21, 1993

Dr. John C. Molina
Vice President of Student Services
Valley College
701 South Mount Vernon
San Bernardino, CA 92410

Dr. Molina;

I am writing this letter in regards to a sexual harassment charge against one of my prior instructors, Dean Cohen. Although I do not know the person who has filed the complaint I am writing this letter in her behalf. I understand the college will be reviewing this issue in a meeting set for Wednesday, May 26. I am sorry for this letter being given to you at such a late date but I only recently found out about this.

In August of 1991 I enrolled in college, at age 31, for the first time because I needed skills to make myself more

marketable. I knew basic English was a major weak area so I enrolled in a basic English class. After approximately three weeks I was requested by the instructor to transfer to Freshman Composition/101 because he needed the class space and felt my first assignments showed I could handle it. I apprehensively complied and as of this date still do not have the skills I intended to get.

When I started Mr. Cohen's class I felt very confused at Mr. Cohen's classroom demeanor. He was consistently late and frequently absent. He always appeared to have just gotten out of bed and wore his shirts mostly unbuttoned (like during the disco era). He told our class several times how he had been up until the early morning hours grading our papers over a bottle of scotch or some type of alcohol. But what was hardest for me to understand, or become comfortable around, was his frequent use of sexually oriented words like "fuck, dick, asshole, tits, or boobs." I never heard a high school teacher talk like this and had been taught to respect your teachers. How could I respect this man or look up to him when he used "street gutter language?" I approached my husband regarding the use of such language in the classroom as he was a student at California State University San Bernardino at the time. He felt he had never encountered an instructor who abused the use of sexually oriented words. He had only heard instructors use correct scientific names and in an educationally oriented way.

Although I missed the first two or three writing assignments, which I have no idea what the topics were, Mr. Cohen stated he would grade me from my transfer date forward. From that point I only remember two papers that were of a non-sexual nature. The ones I do remember

were on obscenity, profanity, pornography, and sexual harassment. It was almost guaranteed that he would devise the assignments in such a way that you would be forced to reveal your sexual morality or preferences.

When class would meet to discuss topics it was not uncommon for Mr. Cohen to strongly debate a students point of view. This was not a problem for me until it would become demoralizing to the student. An example I remember was a fellow student who previously owned a video store and refused to handle hard-core pornography tapes. Mr. Cohen argued with the student that she was wrong because everyone has the right to view whatever they wish to. The student repeatedly stated the tapes were disgusting only to hear Mr. Cohen argue that just because she had a "hang-up" about it didn't mean it was okay to keep others from viewing it. This student never came back to class and filed a complaint against Mr. Cohen.

A majority of the students in class often became upset at his grading practices. I believe students had a hard time getting a good grade because they felt inhibited when an assignment would require them to reveal their ideas regarding sexuality. I would often wonder when turning in an assignment if Mr. Cohen thought I was a prude because I found it hard to write in the fashion I think he wanted. My grade in Mr. Cohen's class was a "C", which was almost enough to make me think I couldn't handle college. Since then I have completed three classes with A's and am currently finishing three more classes that I should recieve [sic] A's.

Mr. Cohen took great pride in telling of his association with magazines, usually of a pornographic nature, like *Hustler*. He distributed several articles he had written for magazines that had been published but I failed to find any educational use for them. The articles were quite old but this showed me that he was used to using his open sexual mannerism for some time.

Dean Cohen continually tried to "shock" people with his vulgar language and comments. I remember two of my classmates who referred to him as a chauvanist [sic], womanizer, or a pig. Frankly, those were my favorite terms for him also.

Some people might wonder why I chose to stay in an atmosphere that made me feel so uncomfortable and mad. My only response would be that firstly I wanted to finish something I had started. Secondly I was ignorant as to what was normal for college and, therefore, set aside the uncomfortable feelings I had in his class. Because of this experience I would encourage any students considering his class to find another alternative. He is definitely not the type of teacher I would like my daughter's to encounter.

Thank you for letting me tell you what I remember. I hope that you find adequate resolve for this situation. Please contact me at (909) 874-3224 if you have any questions. I regret I cannot attend the hearing, but have made a personal decision not to.

Sincerely,

/s/ Suzanne Milleson
Suzanne Milleson

N-16

PSYCHOLOGICAL TRAUMA CENTER

Affiliated with Illegible Medical Center

(Letterhead Omitted In Printing)

December 15, 1992

SAN BERNARDINO VALLEY COLLEGE
701 South Mount Vernon Avenue
San Bernardino, California 92410

I am in receipt of your letter dated December 10, 1992 concerning a San Bernardino Valley College Freshman Composition class assignment. I understood that each student was asked to write an essay arguing logically and without emotion either the pros or cons of consensual sex with children since there is no evidence of either emotional or physical harm to children as a result of consensual sex.

I am shocked by this assignment as described! Consensual sex involving children is in fact impossible. Prepubertal children are, in fact, incapable of giving consent to sexual activity. Consequently, sexual relations between an adult and a child constitute a criminal act comparable to rape. Asking a student to argue the pros and cons of committing a felony is extremely dangerous.

Further, the contention that there is no evidence of emotional or physical harm arising from adult-child sex is absurd. There is a wealth of medical literature documenting the range of serious injuries directly caused by child sexual abuse. To assert otherwise to students is an egregious example of shoddy scholarship in an area of

great potential danger, especially given the lack of student protest. This is not an issue of academic freedom, but one of academic responsibility that must be confronted by senior college administrators and legal counsel.

Thank you for bringing this important matter to my attention.

Yours sincerely,

/s/ Spencer Eth, M.D.
Spencer Eth, M.D.
Medical Director
Psychological Trauma Center

N-18

Message:

Date 5-13-93 Time 10:25

To Dr. Nelms

From Bradley Lunsford

Telephoned	✓	Please Call	
Returned Your Call		Will Call Again	
Would Like Appt.		As soon As Possible	
For Your Information	✓	Won't Be in Class	

He said Ms. Cates was an excellent instructor. He is down to earth, and relates to the student. He is one of his favorite instructors and would take his class again if he could. Did not feel any subject matter was of Feminine

Signed Wilma

BEST AVAILABLE

Message:

Date 5-13-93 Time _____

To Alma Torres

From Class 015- Tellez

Telephoned		Please Call	
Returned Your Call		Will Call Again	
Would Like Appt.		As soon As Possible	
For Your Information		Won't Be in Class	

told me Instructor used colorful language - Did not consider it Sexual Harassment

Signed Tellez

COPY

May 25, 1993

Henry Merten was in the same class with the complainant.

Cohen: Anita Murillo suggest that I could be persuaded with a bottle of Scotch which I presume means that I could be persuaded to give grades on the basis of having a bottle of Scotch delivered to me.

Merten: That was a joke. I never took this seriously and I am sure most of the class did not take it seriously.

Cohen: She says that continuously I talked about sex and pornography. If I remember correctly, about 2/3 of the class was devoted to grammar. During that time did I talk continuously about sex and pornography?

Merten: No, Those were brought up as possibly just to get our minds on what direction you wanted us to go. You did not ramble on about it or nothing.

Cohen: She says the environment in the classroom was an uncomfortable one because I was always looking through the women. Did you observe that to be the case?

Merten: No. I am not a woman but I never observed you like hitting on anybody or anything like that or talking suggestively or anything.

Cohen: In fact, you have been in two classes with me. Did you see that in either of those classes?

Merten: No.

Cohen: Did you find the class environment to be uncomfortable?

Merten: No, I liked going to your class. I always enjoyed it. It was intriguing.

Cohen: She says one issue discussed in the classroom I was talking about cannibalism. I was discussing how a three year old child's buttox would make a good roast. Do you remember how that subject came to be discussed?

Merten: We were discussing Jonathan Swift's "A Modest Proposal" and Jonathan Swift was the one who said that. And that is what you were quoting from that. She must have misunderstood that. The reason you gave that to us was to give us an example of a good argument. Even though it talks about such a twisted subject, it almost sounds logical.

Cohen: But it was clear that I was not advocating this?

Merten: Yes.

Cohen: Then she says that I added that I would rather have a woman's breast. Do you recall me saying that?

Merten: No.

Cohen: She said that she came to see me so you would not have been privy to this, but she said that she came after class to meet me in a bar I would help her. She said that I said it in a very suggestive way. Did you see anything in any of those two classes with me that suggested that such behavior was typical of me?

Merten: No, I can't imagine you being like that.

Cohen: She also said that I made a point of saying that I was a writer for Hustler magazine. But I also mentioned that I wrote for the Department of Defense.

Merten: There was a long list of those that you mentioned writing for but I cannot remember all of them.

Cohen: So the point was to talk about a professional approach to writing as opposed to the normal academic approach to it.

Cohen: Have you any comments about the charge of sexual harassment against me based on your experience in the classroom with me?

Merten: I think if anything she probably just misunderstood your personality. You are very humorous in a lot of ways and the type of sarcasm some people can take wrongly. I think maybe she just probably was disgusted with you early. Like a first impression. Like sometimes a first impression turns some people completely around and they are not giving you a chance. But I think that is most of her assumptions based on those kinds of things. I enjoyed your humor in the class and it make it fun to come to the class. It cheered us up and all of that.

Cohen: In your observations of the class, were the women in the class apparently, with the exception of Anita, capable of enjoying and did enjoy the humor in the classroom?

Merten: Yes, I think so. I did not hear any complaints about it really. For the most part, I think they did see the humor in it. You were not trying to suggest anything to them about yourself or anything.

Cohen: You said maybe she was disgusted too early. Did she have reason for that?

Merten: You know it is just like if you see . . . like going back to the movie "The Life of Brian." I heard a woman

say she stayed for 15 minutes of it and said it was sacrilegious and just walked out and did not give it a chance at all. You know that is just the first impression, I guess. I think in a way you kind of appeared to the class at first because of your rather bold coming in and everything you said was kind of shocking just to even bring up those things with the Scotch and whatever. It was a shock but just to hear that from a teacher was kind of strange. But in the same sense it was refreshing to most of the class. Just to see that you were not a stuffy old professor or something. Maybe she just kind of took it wrong from the start or something.

Cohen: Do you think the class was academically responsible. That we went through the course material of grammar and you did a lot of writing? The writings were all connected to articles that were serious issues?

Merten: Yes, all.

Cohen: Any final comments with regard to the charge?

Merten: I think I have run out of words.

Cohen: Would you say there is merit in any of the accusations?

Merten: No.

End of Conversation.

wlf

/s/ Henry Merten

APPENDIX O

STUDENT SEXUAL HARASSMENT PLAN POLICY 6130

A. Introduction

1. Harassment on the basis of sex is a violation of both federal and state laws as well as this District policy. The colleges of the District will provide to all students a learning environment free from sexual harassment, and will not tolerate such conduct on the part of any employee.

2. Any student with a complaint of sexual harassment should immediately report it to his/her counselor or the Chief Student Services Officer. If the counselor or the Chief Student Services Officer is the individual about whom the complaint is to be made, the student should make the complaint directly to the College President or designee. All complaints reported to a counselor or the Chief Student Services Officer shall be immediately reported to the College President. It is the College President's responsibility to see that all complaints of sexual harassment are promptly and thoroughly investigated and properly resolved. No student will suffer reprisals for reporting any incidents of sexual harassment or making a complaint. Violations of this policy by an employee are causes for disciplinary action up to and including termination.

B. General Definitions

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal,

written, or physical conduct of a sexual nature. It includes, but is not limited to, circumstances in which:

1. Submission to such conduct is made explicitly or implicitly a term or condition of a student's academic standing or status.

2. Such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment.

3. Submission to or rejection of such conduct is used as the basis for academic success or failure.

C. Forms of Sexual Harassment

Forms of sexual harassment include, but are not limited to, the following:

1. Verbal harassment – Derogatory comments, jokes or slurs;

2. Physical harassment – Unnecessary or offensive touching, or impeding or blocking movement;

3. Visual harassment – Derogatory or offensive posters, cards, cartoons, graffiti, drawings, or gestures; and

4. Sexual favors – Unwelcome sexual advances, requests for sexual favors, and other verbal, written, or physical conduct of a sexual nature upon which is conditioned any educational/academic benefit, or conduct which unreasonably interferes with a student's academic performance or creates an offensive learning environment.

D. Grievance

A student who perceives that he/she has been sexually harassed under the conditions of this policy shall follow the procedures outlined in the "Student Grievance" Policy 6090.

Approved: August 8, 1991

APPENDIX P

STUDENT GRIEVANCES **POLICY 6090**

PREAMBLE

The relationship between students and college personnel is of vital importance to the learning process. The right of students to petition for redress of grievances is fundamental. The following procedures are designed to provide an equitable opportunity for resolution of alleged injustices, conditions, or problems caused in part by the actions or practices of District employees. Said procedures allow students the possibility of a fair and complete hearing of their grievances.

A. Grievance proceedings may be initiated against a District employee for any of the following reasons:

1. Any act or threat of intimidation; any harassment (sexual or other); any act of discrimination.

2. Any act or threat of physical aggression.

3. Any arbitrary action or imposition of sanctions without proper regard to academic due process as specified in college procedures.

4. Any violation of student rights which are described in the Preamble to this policy.

5. Students who wish to initiate a grievance against an instructor regarding a grade issued to them by the instructor should be informed of the following provision of State law. "When grades are given for any course of instruction taught in a community college district, the

grade given to each student shall be the grade determined by the instructor of the course and the determination of the student's grade by the instructor, in the absence of mistake, fraud, bad faith, or incompetency, shall be final." This means that no individual or group, whether acting on a grievance or in some other manner, has the authority to change a grade determined by an instructor unless persuasive evidence is presented indicated mistake, fraud, bad faith, or incompetency on the instructor's part. Accordingly, students are advised not to initiate a grievance involving grades unless it is accompanied by evidence of mistake, fraud, bad faith, or incompetency.

B. Grievance Procedures

1. A student who wishes to discuss a grievance relating to a condition or practice of the District/colleges, including but not limited to alleged unlawful discrimination, must first attempt to resolve the issue by contacting the instructor/administrator/supervisor of the class, service or office most closely related to the origin of the alleged problem.

2. A student who is not satisfied with the outcome of that conference may next attempt to resolve the alleged problem by conferring with the immediate supervisor of the person with whom the initial conference was held.

3. If the alleged problem is still unresolved, the student may request a formal hearing.

4. Any instructor/administrator/supervisor who has conferred with a student who requests a hearing shall

prepare a written account of the discussion which shall be made available to the Chair of the Hearing Committee. Such documentation will also be made available to the person(s) alleged to have created the problem(s).

C. Group Grievances

In the event of a grievance by more than one student on the same issue, the group shall select one person to be spokesperson/representative of the group.

D. ARP 6090 outlines Grievance Hearing Procedures.

Approved: August 8, 1991

APPENDIX Q

ADMINISTRATIVE REGULATIONS & PROCEDURES (ARP)

STUDENT GRIEVANCE HEARING PROCEDURES

ARP 6090

A. Hearing Request

1. Request for hearing shall be submitted in writing to the college president or designee. This written notice shall state the condition, practice, or alleged act, injustice, or unlawful discrimination which is being grieved and, if possible, should include a proposed solution of the problem.

2. Within three (3) working days of receipt of the grievance notice, the college president or designee shall determine if the allegations were filed in a timely manner.

3. If the grievance notice fails to meet the above criterion, the college president or designee may terminate the hearing request and notify the student of this action.

4. If the grievance notice is not terminated, the college president, within five (5) working days, shall appoint a Student Grievance Hearing Committee following the guidelines under Disciplinary Hearing Committee of the policy. The student and any college personnel involved in the allegations shall be notified of the time and place of the hearing in writing. The notice shall include the names of the Hearing Committee and all documentation relating to the allegation(s).

5. The Hearing shall convene within ten (10) working days. The grievant and the person being grieved will be allowed on preemptory challenge. Refer to Formal

Notice, A.3., under Disciplinary Hearing Procedures for guidelines.

a. The Hearing shall be closed unless the District employee against whom the grievance is brought requests that it be open.

b. The following persons should be present:

(1) The Hearing Committee

(2) The student grievant and representative, if any

(3) The college employee against whom the grievance is brought and a representative of the bargaining unit (SBCCDCTA or SBCCDCSEA) and/or legal counsel, if any

(4) Witnesses, while presenting testimony

c. Both parties shall notify the Committee chairperson in writing within three (3) working days of the Hearing if he/she will be represented by an advocate and/or legal counsel. Such notification shall include the name and title of the advocate and/or legal counsel. The Committee chairperson shall be obligated to immediately notify the parties directly involved.

d. The Committee shall make the determination regarding the recording of the proceedings.

e. All participants in a hearing shall be advised by the Committee Chairperson that the proceedings are confidential.

f. Witnesses shall not be required to testify under oath; however, witnesses shall be advised that false

testimony will constitute grounds for college disciplinary action.

g. The proceedings will not be bound by formal rules of evidence nor trial-like procedures. Rather, the procedures will be those upon which reasonable persons would rely in the conduct of serious affairs. The Committee Chairperson shall rule on all procedural issues. If substantive or procedural issues arise during the Hearing which require external assistance for resolution, the Hearing Committee Chairperson should recess the Hearing and submit the issue to the college president for resolution.

h. Evidence and/or testimony which may irrelevant or unduly repetitious may be so noted by the Committee Chairperson.

i. The burden of proof to sustain a grievance rests with the student.

j. If the student or representative fails to appear at the time and place scheduled for the Hearing, the grievance will be considered to have been withdrawn and procedures will be terminated.

k. Upon conclusion of the Hearing, within five working days, the Committee Chairperson shall submit to the college president or designee a written report. The report shall include:

(1) A brief summary of evidence submitted,

(2) A fining [sic] of facts, supported by a preponderance of the evidence,

(3) A recommendation that the grievance be sustain the grievance, a recommendation of appropriate corrective action.

(4) In the event the recommendation is to sustain the grievance, a recommendation of appropriate corrective action.

6. Within five (5) working days following receipt of the report of the Hearing Committee Chairperson, the college president or designee shall provide a written notification the to student and to other parties directly involved in the issues as to the recommendation. In the case of a designee, the college president may accept or reject the recommendation. The college president will advise all parties directly involved of the decision within five (5) working days.

7. If either party is not satisfied with the final college-level disposition of the grievance shall, through the District Chancellor's Office, appeal directly to the San Bernardino Community College District Board of Trustees within ten (10) working days.

B. Time for Filing a Grievance Notice

The college president or designee may refuse to consider any grievance that is based on events which occurred more than 180 calendar days prior to the date the grievance was filed. However, if the grievant did not know and did not have reason to know of the event when it occurred, the 180 calendar day time period shall begin as of the day the grievant learned or reasonably should have learned of the occurrence of the event. In absolutely

no case, however, will the grievance be reviewed if it arises out of events which occurred more than one (1) calendar year prior to the date the complaint was filed.

C. Standing to File A Grievance

The college president or designee may refuse to review any grievance filed by a person who is not a student at the time of filing of such grievance unless it is filed by a person who, although not a student at the time of filing, was a student within thirty (30) calendar days prior to the date on which the grievance was filed or was engaged in the process of registering to become a student at the time the allegations being grieved occurred.

Approved August 8, 1991

MOTION FILED

FEB 26 1997

(2)

No. 96-1173

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

CHARLES H. BEEMAN, et al.,

Petitioners,

v.

DEAN COHEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AND *AMICI CURIAE* BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

The Community College League of California ("League") and Educational Legal Alliance of the California School Board Association ("Alliance") respectfully move this Court, pursuant to Supreme Court Rule 37, section 2(b), for leave to file the brief submitted herewith, as *amici curiae* in support of the Petition for Certiorari ("Petition") of Petitioners Charles H. Beeman, et al. ("Petitioners"). This motion is necessary because counsel for Respondent Dean Cohen, Stephen F. Rohde, refused consent to filing of the brief.

As is more fully explained in the brief, the League and the Alliance are interested in the present case because they represent hundreds of community colleges and school districts across California that have adopted sexual harassment policies as required under federal and state anti-discrimination laws. These organizations are concerned that the opinion of the Ninth Circuit could significantly affect the enforcement of these policies which are substantially similar to the one at issue in this case and subject California school and colleges to inconsistent legal liabilities under federal law.

The brief submitted by the League and the Alliance addresses the predicament the appellate decision creates for California's public educational institutions, which are striving to prevent sexual harassment in their workplaces and educational settings, while at the same time honoring First Amendment rights. The subject of the considerable impact of the decision on California's public educational institutions is not fully treated in the Petition of the Petitioners, individual administrators who do not represent the institutions' interests.

Counsel for the League and the Alliance, who have drafted the brief, are familiar with the issues presented in this

case. They have reviewed the Ninth Circuit's opinion, the district court order, the appellate briefs filed by the parties and *amicus curiae*, and the Petition. The League's Counsel of Record has also discussed the issues at length with Petitioners' counsel, Susan Boyle, who granted consent on behalf of Petitioners for the filing of the *amici curiae* brief.

Wherefore the League and the Alliance respectfully move that this Court grant leave to file the brief of *amici curiae* submitted herewith.

Dated: February 25, 1997

Respectfully submitted,

Marilyn Kaplan

Marilyn Kaplan

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

California law requires every educational institution in the state to adopt and enforce a written policy prohibiting sexual harassment. These duly adopted and administered sexual harassment policies generally mirror the applicable state and federal laws and regulations, including the portions that outlaw "hostile environment" sexual harassment.[1/] The college's policy invalidated in this case is not anomalous, but is instead virtually identical to those standardized policies in effect throughout California.

In finding the sexual harassment policy of San Bernardino Valley College ("College") "unconstitutionally vague as applied," the Ninth Circuit's decision challenges the sexual harassment policies applied by nearly every school district and community college in California. California's educational institutions find themselves in a predicament: on the one hand, they are mandated to enforce their policies or face *per se* liability to victims of sexual harassment, such as the student in this case; on the other hand, such enforcement may violate First Amendment free speech rights, as successfully asserted by the professor here.

The Community College League of California ("League") is a non-profit, public benefit corporation whose membership consists of the 71 local community college districts in the state. The districts together serve hundreds of

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[1/] A representative sample of sexual harassment policies from California community college districts and school districts which was attached to the brief of *amici curiae* at the Ninth Circuit has been omitted here.

thousands of students and employ thousands of professors and other staff. The League represents its member districts on issues of statewide importance to community colleges in California. The League provides numerous services to its members, including advice and assistance on the interpretation and implementation of laws affecting community colleges.

The Education Legal Alliance ("Alliance") is a nonprofit association of public school district (grades K-12) governing boards and county boards of education. The Alliance represents its members, more than 650 of the state's 1,000 school districts, on issues that have statewide consequences for public education. The Alliance's activities include, as in this matter, joining in litigation where the interests of public education are at stake.

The League and the Alliance are concerned that the appellate decision has caused great uncertainty among educational institutions as to how they are to fulfill their seemingly conflicting legal obligations. Increasingly, this unavoidable and as yet unresolved dilemma at the intersection of sexual harassment law and the First Amendment is surfacing in court cases involving schools and colleges and their teachers and students. *Amici curiae* thus urge this Court to grant the petition for writ of certiorari and provide much-needed guidance as to whether policies like the one at issue here are constitutionally permissible and, if not, what modifications are required to bring such policies within constitutional parameters.

ARGUMENT

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' DECISION CREATES SERIOUS DOUBT ABOUT THE CONSTITUTIONALITY OF ENFORCING THE SEXUAL HARASSMENT POLICIES OF VIRTUALLY EVERY CALIFORNIA PUBLIC EDUCATIONAL INSTITUTION

I. THE COLLEGE'S POLICY REFLECTS CURRENT FEDERAL AND STATE LAW ON PREVENTING SEXUAL HARASSMENT

Sexual harassment has been recognized for more than ten years by this Court as a form of illegal sex discrimination. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 91, L.Ed.2d 49, 106 S.Ct. 2399 (1986). California law is in accord. Cal. Gov. Code. § 12940(h)[2]/; *Accardi v. Superior Court*, 17 Cal.App.4th 341, 348 (1993). Recently, this Court held that sexual harassment in an educational setting was actionable. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992)[3]/. Moreover, sexual harassment has been held to violate the Fourteenth Amendment's Equal Protection clause. *Bator v. Hawaii*, 39 F.3d 1021, 1027 (9th Cir. 1994).

Sexual harassment takes two forms: (1) *quid pro quo*, in which favorable treatment is conditioned upon acceding to

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[2]/ Cal. Gov. Code § 12940(h)(1) specifically outlaws harassment as a form of discrimination.

[3]/ *See also Governing Board of ABC Unif. School Dist. v. Haar*, 28 Cal.App.4th 369 (1994) (teacher's sex harassment of students cause for dismissal).

unwelcome sexual advances; and (2) hostile or abusive environment, in which gender is a substantial factor in the creation of a hostile environment. *Ellison v. Brady*, 924 F.2d 872, 875 (9th Cir. 1991); *Accardi*, 17 Cal.App.4th at 348. Relying on regulations promulgated under Title VII, 42 U.S.C. section 2000e, the *Meritor* court recognized that forcing an employee to work in an environment which is hostile based upon her or his gender constitutes illegal discrimination. 477 U.S. 57, *citing* 29 C.F.R. § 1604.11. This Court held that Title VII is violated where the workplace is permeated with "discriminatory intimidation, ridicule, and insult," 477 U.S. at 65, that is "sufficiently severe or pervasive to alter the condition of the victim's employment and create and abusive working environment." 477 U.S. at 67.

Since *Meritor*, this Court has further instructed that a hostile environment will be found where it "would reasonably be perceived, and is perceived, as hostile or abusive." *Harris v. Forklift Systems*, 510 U.S. 17, 22, 126 L.Ed.2d 295, 114 S.Ct. 367 (1993).[4]/ This Court further noted that, "[t]his is not,

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[4]/ The court in *Fisher v. San Pedro Peninsula Hospital*, 214 Cal.App.3d 590 (1989), in interpreting California's anti-discrimination law, defined a hostile environment in similar terms:

> '[s]exual harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives its victim of her statutory right to work in a place free of discrimination, when the sexually harassing conduct sufficiently offends, humiliates, distresses or intrudes upon its victim so as to disrupt her emotional tranquility in the workplace, affect her ability to perform her job as usual, or otherwise interferes with and undermines her personal sense of well being.'

Id. at 608, *quoting* California's Fair Employment & Housing Commission decision in *DFEH v. Bee Hive Answering Service*, FEHC No. 84-16 at pp. 18-19 (1984).

and by its nature cannot be, a mathematically precise test"; instead, what constitutes a hostile environment must be determined on a case by case basis. 510 U.S. at 22-23.

Both federal and California courts have explained that hostile environment harassment may occur in a variety of ways: pervasive use of derogatory and insulting terms relating to women; sexual epithets; and sexually explicit remarks. *Accardi* 17 Cal.App.4th at 348-49. *See, e.g., Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994) (frequent use of derogatory terms and sexual epithets constituted hostile environment); *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989) (hostile environment found where, *inter alia*, female employees subjected to sexual comments and sexual advances). While the Equal Employment Opportunity Commission's ("EEOC") Guidelines, 29 C.F.R. section 1604.11, discussed below, specifically address conduct that is sexual in nature, sexual harassment need not involve sexual activity or language to be actionable. Abusive behavior or language of a non-sexual nature, when sufficiently patterned or pervasive and directed toward individuals because of their gender, may also give rise to discrimination liability. *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987); *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985); *Accardi*, 17 Cal.App.4th at 344, 348. In literally hundreds of hostile work environment sexual harassment cases, beginning with the seminal case of *Meritor*, employers, including public employers like school districts and community colleges, have not just been permitted to try to prevent verbal acts of harassment from creating a hostile environment in their workplaces--they have been *required* to do so.

This Court has applied the law on hostile work environment to the educational setting. *Franklin*, 503 U.S. 60. The *Franklin* court held that when a teacher sexually harasses

a student, that teacher discriminates on the basis of sex within the meaning of Title IX, 20 U.S.C. section 1681, and the educational institution may be liable for such harassment.[5]/ 503 U.S. at 75.

In 1984, the California legislature made sexual harassment in the workplace and in the educational setting virtually synonymous, defining sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting," where, among other things, "the conduct has the purpose or effect of having a negative impact upon the individual's work or academic performance,[6]/ or of creating an intimidating,

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[5]/ *Cf. Intelkofer v. Turnage*, 973 F.2d 773, 777 (9th Cir. 1992), citing 29 C.F.R. § 1604.11, subd. (d) (employer liable if it knew or should have known of the conduct, yet failed to take immediate and appropriate corrective action). The Ninth Circuit has also strongly implied, *in dicta*, that school teachers and administrators have a duty under Title IX to curb student-to-student sexual harassment. *Clyde K. v. Puyallup School College No. 3*, 35 F.3d 1396, 1401 (9th Cir. 1994) ("given the extremely harmful effects [peer] sexual harassment can have on young female students, public officials have an especially compelling duty not to tolerate [sexually explicit remarks] in the classrooms and hallways of our schools"); *see also Doe v. Petaluma City School District*, 54 F.3d 1447, 1451 (9th Cir. 1994) (suggesting, but not deciding, that a school administrator may be likened to an employer and thus may be liable for peer sexual harassment for failing to curb such conduct). Indeed, district courts have already held that school administrators may be liable for tolerating peer sexual harassment. *See, e.g., Oona R.-S. v. Santa Rosa City Schools*, 890 F.Supp. 1452 (N.D. Cal. 1995); *Doe v. Petaluma City School Dist.*, N.D. Cal. Case No. C 93-00123 CW, July 22, 1996 Order Granting Plaintiff's Motion for Reconsideration (unpublished opinion).

[6]/ Arguably, the use of "negative impact" makes this provision even broader than the EEOC Guidelines, 29 C.F.R. § 1604.11(a), and the

hostile, or offensive work or educational environment." Cal Educ. Code § 212.5.

The College's policy[7]/ defines harassment in conformity

College's policy at issue. Both the Guidelines and the College's policy speak of the purpose or effect of "unreasonably interfering with," rather than "of having a negative impact upon" the individual's performance. This "unreasonably interfering with" language harmonizes with the case law that requires that an environment be objectively hostile in order to be actionable. *See Harris*, 510 U.S. at 22, 126 L.Ed. at 302; *Ellison*, 902 F.2d at 879.

[7]/ As the Ninth Circuit noted in its opinion, the College's policy defines sexual harassment as

> "unwelcome sexual advances, requests for sexual favors and other verbal, written, or physical conduct of a sexual nature, it includes, but is not limited to, circumstances in which:
>
> 1. Submission to such conduct is made explicitly or implicitly a term or condition of a student's academic standing or status.
>
> 2. Such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment.
>
> 3. Submission to or rejection of such conduct is used as the basis for academic success or failure."

However, what is not included in the Ninth Circuit's opinion invalidating the college's policy on grounds of "vagueness," is that the policy further defines sexual harassment to specifically include:

> "1. Verbal harassment - Derogatory comments, jokes or slurs;
>
> 2. Physical harassment - Unnecessary or offensive touching, or impeding or blocking movement;
>
> 3. Visual harassment - Derogatory or offensive posters, cards, cartoons, graffiti, drawings, or gestures; and

with the EEOC Guidelines, 29 C.F.R. section 1604.11(a),[8]/ and California's Education Code section 212.5, and offers illustrative examples of improper conduct that virtually repeat *verbatim* state regulatory guidelines.[9]/ Comparing the College's

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4. Sexual favors - Unwelcome sexual advances, requests for sexual favors and other verbal, written, or physical conduct of a sexual nature upon which is conditioned any educational/academic benefit, or conduct which unreasonably interferes with a student's academic performance or creates an offensive learning environment."

[8]/ 29 C.F.R. § 1604.11(a) provides:

> Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of any individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

[9]/ In setting forth forbidden employment practices, California's regulations provide:

(1) Harassment includes but is not limited to:

(A) Verbal harassment, *e.g.*, epithets, derogatory comments or slurs on a basis enumerated in the Act.

(B) Physical harassment, *e.g.*, assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on a basis enumerated in the Act.

policy with case law, statutes and administrative regulations, demonstrates that the policy not only tracks the law defining sexual harassment, it is in some regards more specific and narrow as it focuses on sexual activity and language, and prohibits conduct that rises to the level of an "unreasonabl[e] interfer[ence]."

II. THE CONCLUSION THAT THE COLLEGE'S POLICY IS UNCONSTITUTIONALLY VAGUE AS APPLIED IMPLICATES THE LEGAL STATUS OF THE SEXUAL HARASSMENT POLICY OF VIRTUALLY EVERY COMMUNITY COLLEGE AND SCHOOL DISTRICT IN CALIFORNIA

The Ninth Circuit's decision places the College, and all other California educational institutions whose sexual harassment policies model the EEOC Guidelines and California regulations, in a serious predicament. Because the College's policy embodies the current parameters of sexual harassment law, the Ninth Circuit's decision creates great confusion as to how educational institutions can promulgate and enforce the sexual harassment policies required of them without violating free speech.[10/] Anti-discrimination law requires that these

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(C) Visual forms of harassment, *e.g.*, derogatory posters, cartoons, or drawings on a basis enumerated in the Act, or

(D) Sexual favors, *e.g.*, unwanted sexual advances which condition an employment benefit upon an exchange of sexual favors.

Cal. Code Regs., title 2, § 7287.6(b)(1).

[10/] As noted above, the policy specifically prohibited "[d]erogatory comments, jokes or slurs" and "[u]nwelcome . . . verbal, written, or physical conduct of a sexual nature upon which is conditioned any educational/academic benefit, or conduct which unreasonably

institutions implement and enforce policies that prohibit sexual harassment, yet the Ninth Circuit's reasoning results in the unavoidable conclusion that such enforcement impinges on First Amendment rights.

As discussed above, both federal and state law require California educational institutions not merely to adopt policies against sexual harassment but also to *apply* those policies. When application of the policy compels the determination that harassment has indeed occurred, it is then the obligation of the institution to take action against the harasser to stop the illegal conduct. *See Franklin*, 503 U.S. at 74-75; Cal. Educ. Code § 212.6. The College would thus have been remiss, and potentially liable to the complaining student, if it failed to apply its policy and, if it concluded the policy had been violated, to take corrective action.

The professor's behavior in this case would seem to be *exactly* the sort of conduct the College's policy was designed to redress. As the Ninth Circuit itself noted, Professor Cohen placed "repeated focus on topics of a sexual nature" and frequently used profanity, vulgarities, derogatory language and sexual innuendo, which the complaining student believed were directed at female students. In addition, the district court cited evidence that Cohen distributed and/or read to his students articles he had written for *Playboy* and *Hustler* magazines, which referenced his own erection and pornographic films, and that he made a *quid pro quo* offer to the complainant that "if she met him in a bar he would help her get a better grade." *Cohen v. San Bernardino Valley College*, 883 F.Supp. 1407, 1410 (C.D. Cal. 1995).

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interferes with a student's academic performance or creates an offensive learning environment."

When the complaining student asked Cohen if she could write about something other than the assignment topic of pornography, he refused. Unable to bring herself to write about this topic, she failed the class. The College's faculty grievance committee, the College's president, and then the College board of trustees all found the professor's conduct violated the policy. After a trial on stipulated facts, the district court reached the same conclusion.

Nevertheless, the Ninth Circuit found that "Cohen's speech did not fall within the core region of sexual harassment as defined by the Policy." The appellate opinion does not define what is considered to be the "core region" or why this speech and conduct falls outside that purview. Nor did the Ninth Circuit decision address the notion that the speech at issue was either unprotected altogether or was subject to incidental abridgement in order to accomplish the compelling public interest of preventing invidious discrimination. *See R.A. V. v. City of St. Paul*, 505 U.S. 377, 389-90, 120 L.Ed. 2d 305, 112 S.Ct. 2538 (1992); *Roberts v. United States Jaycees*, 468 U.S. 609, 628, 82 L.Ed.2d 462, 104 S.Ct. 3244 (1984).

While the Ninth Circuit held that the policy was "vague as applied," it is difficult to imagine how, under a reasonable construction of the policy, conduct like Cohen's would *not* be prohibited. *See United States v. Dischner*, 974 F.2d 1502, 1509 (9th Cir. 1992) (vagueness as applied standard considers if the conduct at issue in a case is prohibited under a "reasonable construction of the statute"). Furthermore, the Ninth Circuit's finding that the policy did not provide Cohen with adequate notice that his "teaching methods" offended the policy suggests that the Ninth Circuit actually considered the College's policy to be vague on its face. This runs contrary to this Court's admonition that the definition of hostile environment sexual harassment is not capable of exact formulation. *Harris*, 510

U.S. at 22-23. The Ninth Circuit's constitutional objection to the "*ad hoc* basis" on which it found the College had applied its policy to Cohen also contradicts this Court's and the EEOC's instruction that what constitutes a hostile environment must ultimately be determined on a case by case basis. *See Harris*, 510 U.S. at 23; 29 C.F.R. § 1604.11(b).

Moreover, the Ninth Circuit apparently disregarded the fact that the College, in implementing its policy, acted as a government employer and thus ". . . has far broader powers than does the government as sovereign."[11]/ *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686, 697 (1994). This Court in *Waters* instructed that while "speech restrictions must generally precisely define the speech they target," government employees are not afforded such procedural protections.[12]/ 128 L.Ed.2d at 698. For example, a government employer could "prohibit its employees from being 'rude to customers,'" yet the same restriction would be unduly vague when applied to the public at large. *Id.* As the district

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[11]/ As the Ninth Circuit did not distinguish between a governmental body acting as sovereign versus its role as employer, it did not analyze what public employee speech is protected and the balancing test described in *Waters*, 128 L.Ed.2d at 694-96 (to be protected, speech must be on a matter of public concern, and the employee's interest of self-expression on the matter must not be outweighed by any injury the speech may cause the government employer in carrying out its functions). The district court appropriately undertook such an analysis. *See* 883 F.Supp. at 1415-1419. *Cf. Dambrot v. Central Michigan University*, 55 F.3d 1177, 1185-90 (6th Cir. 1995) (college basketball coach's use of the word "nigger" to motivate his players was not on a matter of public concern and thus not protected speech).

[12]/ Nevertheless, the Ninth Circuit used the principle that regulations on "First Amendment activities must be narrowly drawn to address only the specific evil at hand," as a touchstone for finding the subject policy too "vague as applied."

court in this case aptly noted, if a prohibition on being "rude to customers" passes constitutional muster, surely the sexual harassment policy at issue is not unduly vague. 883 F.Supp. at 1421.

Other circuit courts have struggled with this as "yet unresolved dilemma facing courts adjudicating claims . . ." at the juncture of sexual harassment law and the First Amendment and have bemoaned the paucity of Supreme Court precedent providing guidance in this area. *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 195 (5th Cir. 1996). As the Fifth Circuit previously observed:

> Where pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.

DeAngelis v. El Paso Municipal Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995), *cert. denied*, __ U.S. __, 116 S.Ct .473, 133 L.Ed. 403 (1995).

Assuming, *arguendo*, that the Ninth Circuit's vagueness analysis of the policy *is* apt, then, by implication, the First Amendment is necessarily pitted against anti-discrimination law. If the College's policy is inadequate to give fair warning as to what speech is prohibited, then the policies of virtually *all* California's educational institutions, and the federal and state regulations and case law that the policies reflect, are also of questionable validity. While this clash between the First Amendment and the Fourteenth Amendment's equal protection

clause and anti-discrimination law is directly implicated by the Ninth Circuit's reasoning, the decision offers no resolution or even analysis of the problem.

Friction between sexual harassment policies and free speech principles has been acknowledged by several courts of appeal, *see, e.g., Weller*, 84 F.3d 191, and *United States v. X-Citement Video, Inc.*, 982 F.2d 1285, 1296 n. 7 (9th Cir. 1992) (Kozinski, J., dissenting), *rev'd* __ U.S. __, 115 S.Ct. 464 (1994). Academia has also addressed the subject, *see, e.g.*, Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L.Rev. 1791 (1992); Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment - Avoiding a Collision*, 37 Vill. L.Rev. 757 (1992); Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 Ohio St. L.J. 481 (1991). All have expressed the desire that this Court provide guidance to the courts and the public on this important legal and social issue.

CONCLUSION

Under the reasoning of the Ninth Circuit's decision, educational institutions may be liable no matter what they do: if they enforce sex harassment policies that model federal and state regulations they may be liable for free-speech violations, yet if they do not implement and enforce such policies they face discrimination liability. This Court should grant the

petition for certiorari and clarify the law regarding these "troubling" questions, which have most serious ramifications for our state educational institutions.

Dated: February 25, 1997

Respectfully submitted,

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